Supreme Court, U.S.
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No._____

In the Supreme Court of the United States

October Term, 1995

RUTH J. KUHNS,

Petitioner

vs.

MERIDIAN BANCORP, INC., successor to the FIRST NATIONAL BANK OF ALLENTOWN,

Respondent

(CLASS ACTION)

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

Where the same Bank is both the employer of, and trustee for, the same participants in a profit sharing plan and a pension plan, "takes" the assets which are fully vested in the participants from their profit sharing plan and transfers those same assets to itself as trustee of the pension plan at least in part for its own benefit as employer to eliminate its own contractual (and now statutory) obligation to contribute to the pension plan to pay the costs of the pensions,

(a) do these assets "inure" to the benefit of the employer/trustee and is this "taking" contrary to the provisions of Sec. 1103(c)(1) of ERISA which provides that these assets "shall never inure" to the benefit of any employer even though the pension benefits of these same participants purchased through this "taking" are stated to be fully vested?

(b) when these "taken assets" are used to pay monthly pension benefits in whole or in part, reducing or eliminating the employer's obligation, is this a "continuing violation" of ERISA without reference to the Statute of Limitations, a doctrine applied in the Ninth Circuit but not in the Third Circuit?

(c) is the "taking" of these assets a divestiture by the employer/trustee of the vested benefits in the profit sharing plan contrary to ERISA and the specific plan provisions stating that the benefits are "vested"? and

(d) may the provisions of the Internal Revenue Code and Regulations relating to employee benefit plans be applied to adjudicate a private dispute which is also being litigated under ERISA?

PARTIES TO THE PROCEEDINGS

The Petitioner is Ruth J. Kuhns, on behalf of a class of herself and all others similarly situated. Initially when this litigation was started in the United States District Court for the Eastern District of Pennsylvania and thereafter through the United States Circuit Court of Appeals for the Third Circuit there were two additional representative plaintiffs, Blake C. Heffner and William W. Shellhammer, but they have withdrawn as representative plaintiffs; their names appear on many of the documents on record in the courts below which were filed before their withdrawal. The Respondent bank threatened to sue the three representative plaintiffs individually for the bank's attorneys fees and costs if they pursued the litigation. Mr. Heffner did not want to expose his individual assets to a claim where he had been acting on behalf of all other employees or former employees of the bank; and the wife of Mr. Shellhammer is in poor health, and she did not want to endure the pressure and tension of personal litigation against her husband of more than 50 years and urged him to withdraw from the action as a representative of the class. Because of these factors both Mr. Heffner and Mr. Shellhammer have withdrawn.

The Respondent is Meridian Bancorp, Inc., successor to the First National Bank of Allentown.

CORPORATE LISTING
RULE 29.6 STATEMENT

The Petitioner is an individual so that this Petition is not being filed by a corporation, but the litigation was instituted by the Petitioner (along with two other persons who have withdrawn as representative plaintiffs, explained above) in part on behalf of an employee benefit trust fund which is a corporation, Meridian Bancorp, Inc. ("Meridian"), which at the same time is also the Respondent. To that extent it should be reported it is believed that Meridian has no parent and that its subsidiaries are all wholly-owned. However, Meridian has recently announced an agreement or proposal to merge with CoreStates Bank, Inc. (CoreStates), another banking corporation, but at this writing it has not been accomplished, and insofar as is known to the Petitioner, the necessary governmental approvals have not been received, nor have the stockholders of Meridian either voted on the question of the merger or have a majority of them transferred their stock in Meridian to CoreStates or its nominee. By the time this Petition is acted upon the merger may be accomplished.

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No. _____

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995
RUTH J. KUHNS

Petitioner

v.

MERIDIAN BANCORP, INC., successor to the FIRST NATIONAL BANK OF ALLENTOWN,

Respondent

(CLASS ACTION)

Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The Petitioner, Ruth J. Kuhns, by her undersigned counsel, respectfully petitions for a Writ of Certiorari to review the judgment of the Court of Appeals in this case.

REFERENCE TO OPINIONS DELIVERED IN THE COURTS BELOW

The Order of the Court of Appeals for the Third Circuit that is the subject of this Petition immediately follows. The Opinion accompanying the Order appears in the Appendix at pages 1a to 9a. Neither the Order nor the Opinion is reported officially or unofficially since the first page of the Opinion was marked "NOT FOR PUBLICATION", and a recent examination of the list of cases printed in Lexis revealed that it was not reported in that unofficial service. Nor was the Final Order of the District Court printed in any service; it is also printed in the Appendix at pages 10a to 13a.

(Order of the Third Circuit in *Kuhns et al. v. Meridian Bancorp, Inc.*, Nos. 94-1839 and 94-1869.)

Present: Becker, Nygaard, and Alito, *Circuit Judges*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel on July 26, 1995.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court entered August 9, 1994, be, and the same is hereby affirmed insofar as it is challenged in appeal No. 94-1839, but is hereby reversed insofar as it is challenged in appeal No. 94-1869 and the cause is remanded to the district court with directions to enter judgment for the defendants on all counts. Costs taxed against plaintiffs. All of the above in accordance with the opinion of this Court.

ATTEST:
/s/P. Douglas Sisk
Clerk

Dated: September 8, 1995

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals for the Third Circuit was entered on September 8, 1995. The jurisdiction of this Court is invoked under 28 USC §1254(1).

STATUTORY PROVISIONS AND REGULATIONS INVOLVED

The relevant provisions of Statutes involved are:

IRC (Internal Revenue Code)

26 USC §401(a)(2)

26 USC §404(a)(1)(A)(i) and (iii)

ERISA (Employee Retirement Income Security Act)

29 USC §1082(a)(1) and (2)

29 USC §1082(b)(1), (3) and (5)

29 USC §1082(c)(1) and (2)

29 USC §1102(c)(1)

29 USC §1103(a)

29 USC §1103(c)(1)

29 USC §1104(a)(1)

29 USC §1106(a) and (b)

29 USC §1132(a)(1)(B)

The relevant Administrative Agency Regulations are:

Treas. Reg. §1.401-1(b)(3)

IRS Rev. Rul. 69-295.

The texts of the above Statutes and Regulations are reproduced in the Appendix at pages 29a to 37a.

STATEMENT OF THE CASE

This case is a Class Action seeking relief and increased benefits under ERISA, 29 USC §1001 *et seq.* Kuhns, the Petitioner, is a member of, and representative of, a Class of people who are mostly retired persons, or beneficiaries of deceased former retirees, or former participants as employees of the First National Bank of Allentown (First National) in a Profit Sharing Plan established by First National for all of its employees in 1954. Three directors of First National were the Trustees of the Profit Sharing Plan. Meridian Bancorp, Inc. (Meridian), the Respondent, acquired First National through a merger in 1985, and became the successor to First National.

In 1971, First National, as employer, established a Pension Plan for all of its employees and included the persons who are Members of the Class. First National was the Trustee of the Plan. At the same time First National "took" (as it says) all of the assets of the Profit Sharing Trust and turned them over to the Trustee/Employer Bank (itself) for the Bank to use to meet its contractual, legal obligation to fund the Pension Trust. The Bank had a conflict of interest between itself as the legally obligated contributor to the Pension Plan and as Trustee for the participants in the Profit Sharing Plan. This transfer (without consideration) was contrary to both the law and the terms of the Profit Sharing Trust Agreement (even though amended in 1971).

Kuhns and her two initial co-litigants on behalf of the Class brought suit in 1992 against Meridian to get their benefits in full and with a proper rate of interest. The Trustee/Employer Bank (Meridian) defended on the basis of the Statute of Limitations and laches, and that the 4% interest it was accruing on the Trust accounts of the individuals was proper

and reasonable in 1971 and increased it to 5% five years later; it remains so today. The District Court granted Partial Summary Judgement on the Trustee Bank's motion (later Orders substantially revised this) but ruled that the 4% interest rate was arbitrary and directed that a Hearing be held for the purpose of determining a "reasonable" rate. After a second Hearing, ordered by the District Court, this resulted in a finding of fact that the "reasonable" rate of interest was 7.4% (not according to the Agreement which required the actual earnings) and that 7.4% be used to calculate the benefits, and that the vested interests of the participants in the Profit Sharing Trust be used to pay the pension benefits, thus nullifying their vested interests in the Profit Sharing Trust. Kuhns, the Petitioner, claims that this is contrary to law and to the Agreements and appealed to the United States Court of Appeals for the Third Circuit, and after an Order which appears to be adverse to the Class, she, on behalf of the Class, now Petitions the Supreme Court for relief. The Trustee/Employer Bank also disagreed with the Final Order of the District Court and it filed a cross-appeal in the Circuit Court. It appears to have prevailed on cross-appeal.

Factual Background

This case involves the retirement benefits of Kuhns and a Class of almost 190 people, nearly all of whom have retired from Meridian Bank, the Respondent (Meridian) or its predecessor prior to a merger in 1985, with the First National Bank of Allentown (First National). A few are still employed by Meridian.

There is one central question to be decided in this matter. Who gets the money, the assets of the Profit Sharing Trust, vested in the participants, when it is "taken" by the Trustee/Employer Bank and transferred by it to itself, the same Bank, for it to use to pay its own contractual and statutory obligation to fund a Pension Plan? The employee participants or the Bank? The question deals with the retirement benefits payable to the Members of the Plaintiff Class, under the Order of the District Court of August 8, 1994 (the Final Order) (Appendix at page 10a) as it applies to the Profit Sharing Plan and the Pension Plan. All other questions involved in this matter will be resolved by the Decision made in response to this question.

Kuhns is the representative of a Class of persons all of whom were employees of and participants in the Profit Sharing Retirement Plan and Trust of the First National Bank of Allentown on January 1, 1971. On that date they became participants in a new Pension Plan for the same people established by First National. The Bank then discontinued contributions to the Profit Sharing Plan (which is different from terminating the Plan). Meridian now claims that the Profit Sharing Plan was discontinued on January 1, 1971 and "converted" to the Pension Plan; this is incorrect. The assertion was never put to the test of an examination by the Treasury De-

partment or a Hearing in Court in this case. The Agreement between the three directors of the Employer/Trustee Bank on the one hand and the Bank itself on the other transferring the assets required that the Bank obtain Treasury Department approval to do it, which it never did nor could it obtain such approval because of Treasury Regulation §1.401-1(b)(3) and Rev. Rul. 69-295 (both in the Appendix at pages 36a and 37a) which prohibit "converting" a Profit Sharing Plan to a Pension Plan by the same employer for the same employees. Both were then and are still now in effect.

At the outset of the litigation the Employer/Trustee moved for Summary Judgement on the basis of the Statute of Limitations and laches, and the Petitioner and her co-litigators resisted that Motion. The Employer/Trustee represented to the District Court, among other things, that the vested benefits of the participants had been "taken" by it and that the employees knew of this taking and that therefore by the time of the action their claims were barred by the Statute of Limitations as provided by ERISA, 29 USC §1113. The Trustee/Bank claims that the employees' benefits which were lost because of the Statute of Limitations are now owned by or held for the benefit of the Bank as employer. And the Trustee/Employer is now using that money to pay pensions and to meet its statutory obligation to satisfy the requirements of the Minimum Funding Standard Account under ERISA, 29 USC §§1082(a) and (b). The District Judge partially granted the Motion for Summary Judgement by holding that the Statute of Limitations had barred many of the claims of the Plaintiffs but then did allow Ruth Kuhns and Blake Heffner (one of the other initial litigants) to go back 3 years from the date of commencement of the suit, and allowed William Shellhammer (the other initial litigant) to go back 6 years, to claim their benefits.

This matter is controlled by Plan provisions that state that at no time may the assets which are held *in trust* for the Plan participants be turned over to the employer, and is further governed by 29 USC §1103(c)(1) which provides that "... the assets of a plan shall never inure to the benefit of any employer ... ." The Bank now claims that the assets which it "took" in 1971 can be used by it, which is further contrary to the mandate in §1103(c)(1) that the assets of the Plan "... shall be held for the exclusive purposes of providing benefits to participants in the plan ..." etc. These are TRUST assets as required by 29 USC §1103(a). They are not the Bank's money.

In the Spring of 1994 the District Judge ruled that the 4% interest that the Trustee/Bank had determined to credit to each person's Profit Sharing account balance was arbitrary. He found as a fact that instead of 4% in 1971 it should have been 7.4%, and now he has ruled in the August 8, 1994 Order (the Final Order, Appendix at page 10a) that 7.4% should be compounded until paid. As of the end of 1993 everyone's 1971 balance (with 23 years of compound interest) was 5.1653 times greater than in 1971. (See Table I, Appendix at page 38a). The interest is to be accrued every year from 1971 right through the years of retirement. The Bank had stopped accruing the 4% (or 5% after it had been increased) at retirement, and was paying no interest on the account balance thereafter and kept the interest (or the "earnings") for itself. This interest during retirement makes a big difference in retirement benefits (60% to 65%).

By the Final Order of the District Court Ruth Kuhns, for example, will have her retirement benefit increased from $300 per month to $548 per month for the rest of her life. Also she is to get $18,244 in arrearages as of August 31, 1994. Her account balance was $22,733.59 starting in 1971; when this is multiplied by the 7.4% compound interest factor of 5.1653 for 23 years she has an account balance of $69,604 to be held in

trust for her and payable to her and/or her beneficiary, plus interest at 7.4% compounded annually from September 1, 1986 (the date of her retirement) to the date of her death, less any retirement benefits actually paid to her. The 7.4% interest on her account balance during retirement will pay almost all of her monthly pension of $548 so that approximately $1450 per year will be deducted from her $69,604. No calculation has been made of just how many years this will pay her retirement benefit from her Profit Sharing account balance before she starts to draw the $548 per month from the Pension Plan, but it will go well beyond her life expectancy. In one sense, under the Final Order she will never get a payment from the Pension Plan because she will be paid entirely from her Profit Sharing account. In spite of the Pension Plan provisions and her years of service after 1970, the Bank will have paid for her pension benefits by the contributions made to the Profit Sharing Trust fund on her account up to 1970. The Order relieves the Bank of any obligation ever to pay for her service and benefits under the Pension Plan, and as a result she will get no retirement benefits for her 16 years of service after 1970. Under the Order she earned all of it before 1971, and while she worked for a pension benefit after December 31, 1970, she will get none.

At the Hearing leading to the Final Order of the District Court through evidence admitted and on the Record, and through calculations made from documents obtained from the Trustee/Bank through Discovery, the Plaintiffs were able to show that by the end of 1992 the individual accounts vested in the Members of the Plaintiff Class individually in 1971, had increased more than *11 times!* (See Table II, Appendix at page 39a.) This is the figure upon which their benefits should be based. In the aggregate these claims at the cumulative rate of return by the end of 1992 amounted to more than $22,000,000 for the Plaintiff Class out of a combined trust fund for all of

Meridian Pension Plans of $160,000,000. The Third Circuit paid no attention to this egregious breach of trust and apparently has endorsed the Trustee/Bank's taking the money and keeping it to pay its own legal and statutory obligations.

Not only did the Employer/Bank as trustee limit the interest to be credited to the account balances of the participants to 4% (later raised to 5%) but the Trustee/Bank stopped crediting or paying *any* interest of any kind on the account balances after retirement. This was contrary to the Agreement. The Trustee was investing the vested interests of the participants and keeping the interest for itself for the 12 years (according to a retirement table used by the Bank). The Third Circuit also endorsed this practice by its Order.

Every one of the Pension and Profit Sharing Plans which are relevant in this case provides expressly that the account balances in the Profit Sharing Plan for each of the participants is *fully vested* in the participant. Yet the August 8, 1994 Order of the Trial Judge, which was the one appealed to the Third Circuit, in effect divests those interests and forfeits them to the Bank, and provides that the monthly pension benefits which are calculated according to the Order shall be charged against his or her vested Profit Sharing Account Balance, all to the credit of the Bank. This relieves the Bank of paying anything for the Pension benefits which have been earned by the participant since January 1, 1971 which is contrary to the Agreements and contrary to the law. Further, the effect of the August 8, 1994 Order is to nullify all of the Years of Credited Service (as such term is used in the 1971 and later Pension Plans) and persons like Ruth Kuhns will never receive any Pension Plan benefit, not ever. All of this has apparently been approved by the Third Circuit in its Order directing that judgment be entered for the Trustee/Bank "on all counts." As to other persons their years of Credited Service under the Pension Plans are nullified in part and allowed in part. This is

not what the Plans provide or what the law allows. The Courts below had no authority to amend the Plans in this manner. While there have been other pension funds acquired by Meridian in bank mergers, and the assets of those other pension funds have swelled the single pension trust fund, nonetheless the assets from the Profit Sharing Trust Fund "taken" by First National belonging to the Plaintiff Class have been used by the Bank to meet both its contractual and its statutory obligations. As the evidence showed, the trust fund was so grossly overfunded (more than 150% of the actuarial liability) that for the 4 years from 1989 through 1992, both inclusive (1992 is the last year for which information was available at the trial), the Bank made no pension contributions to the trust fund in any of those 4 years, and has made none in the last 2 years; that is, no contributions for the last 6 years! according to public documents filed by the Trustee/Employer Bank. (See Table III, Appendix at page 40a.)

The Bank, as trustee, owes the assets held in the Profit Sharing Trust Fund to the members of the Plaintiff Class in proportion to the account balances credited to each participant as of January 1, 1971. Up to December 31, 1992 that amounts to $22,000,000 and in 1995 would be millions of dollars greater with the additional earnings. And the participants are also owed their vested Pension Plan benefits according to their Years of Credited Service under the Pension Plan, which by its terms is equal to all of the years employed by the Bank. The Third Circuit completely ignored the terms of the Pension Plan.

The District Court had jurisdiction of the matter under ERISA, 29 USC §1132(e)(1).

REASONS FOR ALLOWANCE OF THE WRIT

The reasons for allowing the Writ really abound, but following the suggestion that brevity of the Petition is looked on with favor, the number of reasons will be limited.

I. Conflict Of Interest Between Circuits

As provided in Supreme Court Rule 10, the first reason to be stated is a conflict of Decisions between two Circuit Courts of Appeals. The United States Court of Appeals for the Third Circuit (Third Circuit) has entered a Decision in this case in conflict with the Decision of the United States Court of Appeals for the Ninth Circuit (Ninth Circuit) on the same important matter. The conflict relates to the applicability of the ERISA Statute of Limitations (29 USC §1113) to a "continuing violation" of ERISA. The Ninth Circuit, in *Meagher v. IAM Pension Plan*, 856 F.2d 1418 (1988), held that the failure of the IAM Pension Plan to obtain the approval, as required by the Internal Revenue Code, of the Treasury Department of a decrease in benefits made an amendment to the IAM Pension Plan a nullity, and that there was no decrease which the Plan could impose on Mr. Meagher and the Plaintiff Class because of the failure to obtain approval of the decrease. The failure to pay the monthly benefits in full was treated as a "continuing violation" of ERISA and that the breach of fiduciary duty did not occur when the Pension Plan was amended to reduce benefits. It ruled that the Statute of Limitations would apply only when the Amendment was *applied* to the participants. It was found that the action complaining of the monthly decrease in benefits was brought within the period

allowed by the Statute of Limitations, and that it was commenced on a timely basis.

In *Kuhns* (the case at bar), the Third Circuit in its Opinion (see Appendix at page 1a) ruled that "The result in Meagher emanates from the particular language of §1054(g)(1) requiring that a participant's benefits actually be 'decreased' before [his] cause of action could accrue." The Third Circuit then went on to say that since the claim in the *Kuhns* case is made under §§1104(a) and 1103(c), which do not require a decrease in benefits to give rise to a cause of action, relief would not be dependent upon a decrease. It ruled that a cause of action would have arisen when the claimants had facts available to them to know that the Employer/Trustee was improperly using plan assets, and determined that sufficient facts were available from 1971 forward. It did not base this ruling on actual knowledge of the participants. The Third Circuit thereby rejected the "continuing violation" doctrine. This had the effect of the Third Circuit putting its stamp of approval on the Employer/Trustee's "taking" of the vested assets from the Profit Sharing Trust and using them for its own purpose of funding the initial past service cost under the new Pension Plan. Apparently the Third Circuit has adopted the view that while it may have been contrary to law in 1971 (see IRC §401(a)(2), Appendix at page 29a, Treas. Reg. §1.401-1(b)(3), Appendix at page 36a, and IRS Rev. Rul. 69-295, Appendix at page 37a) for the Trustee/Employer Bank to "take" the assets from the Profit Sharing Trust (which were fully vested in the participants), it could use the same assets for the purpose of eliminating its own obligation to fund a substantial portion of the cost of the new Pension Plan, so long as an action were not commenced before the expiration of the three-year or six-year periods of the Statute of Limitations. And if no action were commenced within that period that the Employer/Trustee could use those same assets to fund its statutory obligation to

meet the Minimum Funding Standard under ERISA, §1082 (a), (b) and (c) (Appendix at pages 31a and 32a), and thus continue its violation of its breach of fiduciary duty from 1971 up until the present moment, now a period of 24 years.

The fundamental principle of *Meagher*, as determined by the Ninth Circuit, was the "continuing violation" of ERISA, a matter which could be addressed in litigation until it became resolved and became res judicata. In *Kuhns* all 190 members of the Plaintiff Class would have had to know what the Employer/Trustee had done with their vested profit sharing balances and that the Employer/Trustee (the same bank) was allowing them 4% interest for some purpose. The District Court found that the determination of the 4% interest being credited to each individual account from 1971 forward (it was increased to 5% in 1976) was arbitrary and the District Court found that a "reasonable" return should have been allowed (relying on *Hickerson v. Velsicol Chem. Corp.*, 778 F.2d 365 (7th Cir. 1985)) and then found as a fact after a Hearing that 7.4% interest was a "reasonable" amount. (See Table I, Appendix at page 38a.) But it was not until after the litigation was started that the participants were informed (through Discovery) that the actual earnings to be credited to their account balances (required by the Profit Sharing Agreement) were more than 11 times (arithmetically more than 1100%) on a cumulative basis. (See Table II, Appendix at page 39a.) To have started an action before this to obtain a greater return than 4% only to find that the actual return was, for example, 3.5% (always a possibility if one did not know what was transpiring) would have exposed the participants to the defense of *damnum absque injuria*. Most, if not all, of the participants then also learned for the first time that the statement by the Employer/Trustee made to them, in writing (admitted into evidence) that 4% was "... [a]t a rate approved by the Internal Revenue Service." This statement was a misrepresentation by

the Employer/Trustee, because the Internal Revenue Service never passes on the rate of return in a profit sharing plan.

This conflict in the Decisions relating to the continuing violation doctrine between the Ninth Circuit in *Meagher* and the Third Circuit in *Kuhns* can only be resolved by the Supreme Court. A national policy on this point is one reason why the Petition should be granted.

II. Non-Inurement, The Statute Of Limitations And Laches

The "non-inurement" of provision of ERISA, 29 USC §1103(c)(1) should be correlated with the ERISA Statute of Limitations, 29 USC §1113 and its functional equivalent for this purpose, the doctrine of laches. What happened here was that the Employer/Trustee "took" by its own description the vested account balances in the Profit Sharing Plan for its own benefit to relieve itself of the obligation of funding a major part of the initial past-service cost under the new Pension Plan. The Pension Agreement of 1971 in the usual manner expressly obligated the Bank as employer to fund the Pension Plan. It applied for and obtained approval from the Treasury Department that the new Pension Plan was a "qualified" plan under the provisions of Internal Revenue Code (IRC §401(a), Appendix at page 29a). The bank admits that it was qualified and that it took income tax deductions for its contributions (when they were being made) to the Pension Plan. The Plaintiff Class has pleaded and argued that the provisions of IRC §401(a), as well as ERISA, 29 USC §1103(c), require that the Plan be established and maintained for the "exclusive benefit" of the participants and their beneficiaries. The "exclusive benefit" rule immediately follows the provision in §1103(c) that "...[t]he assets of a plan shall never inure to the benefit of any em-

ployer ...". Since Congress has used the phrase "never inure" it would appear that the "continuing violation" doctrine would apply until the assets of the trust fund have been lawfully applied or distributed.

It is not argued that every breach of fiduciary obligation may be litigated after the expiration of the three-year or six-year period specified in §1113. The argument is that when Congress said "never" it meant at least that when the vested benefits of the participants in the employee benefit trust fund have "inured to" (in this case, "been taken for") the benefit of the Employer/Trustee, an action may be brought to adjudicate the rights of the participants to their benefits, at least until they have been paid, without regard to the three-year or six-year periods specified in §1113.

This doctrine of a "continuing violation", and the restrictions it puts on the Statute of Limitations, should not be novel because for ages, going back to Roman law at least, assets held by a trustee could be used and applied only for the benefit of the participants in the trust fund, and not for the trustee or the settlor. These two statutory provisions, both in the same section of the statute enacted by Congress, are being interpreted by the Third Circuit to provide that the restriction being embodied in the provision that "... [t]he assets of the plan shall *never inure* to the benefit of any employer ..." (emphasis supplied) means that "never" is narrowed to the time periods stated by the Statute of Limitations or by the doctrine of laches. It is suggested that only the Supreme Court can clarify this to establish a nationwide policy and that therefore the Petition for the Writ of Certiorari should be granted.

The order which certified the Class entered by the District Court eliminated an undetermined number of persons from the Class without regard to their not having been paid some or all of the benefits (plus interest) in their account

balances in the Profit Sharing Trust. With the "non-inurement" provision in §1103(c) the District Court, and apparently the Third Circuit, although it is difficult to understand its opinion, approved the retention or "taking" by the Trustee/Employer of the vested benefits belonging to these persons or their beneficiaries and permitting it to keep those assets for its own purposes. This, too, should be clarified to establish a national policy so that if the Decisions of both Courts below are based on the Statute of Limitations and/or laches then it is suggested that the "non-inurement" provision should permit these same persons who have been eliminated to be included in the Class; otherwise no relief is to be granted to them and the Respondent Bank keeps their money. This is a further reason for granting the Petition for a Writ of Certiorari.

III. The Third Circuit Order Is Directly Contrary To Federal Law

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The Supreme Court should also grant the Petition because the Decision of the Third Circuit (Appendix at pages 8a to 9a) either by its terms or in effect is directly contrary to the vesting provisions of ERISA (29 USC §1053(a)(1) and (2), and of IRC §401(a)). It is also directly contrary to the vesting provisions of both the Profit Sharing Plan and the Pension Plan Agreements. The question of the termination of the Profit Sharing Plan was argued in the District Court, at first without effect, but by the time of the District Court's Final Order in the case (Appendix at page 10a) after several Hearings the District Judge did come around to providing that the account balances of each of the participants, which were established only in the Profit Sharing Plan, were to be increased not by 4%, but by 7.4% interest and to be compounded from January

1, 1971 (the date of the "taking") until paid. One of the differences between a Profit Sharing Plan and a Pension Plan is that in the former there are individual account balances for each participant, and in a Pension Plan of the kind established here, there are no individual account balances in the trust. To credit each participant in the Pension Plan with an account balance transferred from the Profit Sharing Trust would be meaningless (unless he died before retirement and the Profit Sharing Plan were still in existence). The participants accumulate pension credits through years of employment and their average salary, but no dollar amount is credited in any trust fund for an individual person. Thus the District Court did find, in effect, that the Profit Sharing Plan had not been terminated.

The Trustee/Employer could not have obtained a determination letter (a ruling) from the Treasury Department that the Profit Sharing Plan had been terminated according to the Treasury's standards because the use by the Employer/Trustee/Bank for its own benefit of the vested assets in the Trust to fund the benefits under the new Pension Plan was not for the "exclusive benefit" of the employees in general. This would have been specifically contrary to Internal Revenue Code 26 USC §401(a)(2) (Appendix at page 29a), to Treas. Reg. §1.401-1(b)(3) (Appendix at page 36a), and to IRS Rev. Rul. 69-295 (Appendix at page 37a). And it was provided in the Agreement between the three trustees of the Profit Sharing Plan on the one hand and the Employer/Trustee/Bank of the new Pension Plan on the other, that upon approval of the Treasury Department of the transfer of the assets the Profit Sharing Plan and Trust would terminate. (The Third Circuit below, in footnote 3, offered the comment, based only on the statement of the Bank's counsel and not on any evidence (no Hearing was held on this subject for this purpose) that "The delay in bringing this action has contributed to the uncertainty in this area, for many of the relevant documents have been lost or discarded."

(Appendix at page 4a) No document could have been lost or discarded in reference to Treasury Department approval because none could have been issued. There was no Treasury Department approval sought or granted.

The Supreme Court should determine what "vested" means in the context of this litigation. ERISA adopts in 29 USC §1002(19) the Internal Revenue Code term of "nonforfeitable". How is this affected by the decision that the Statute of Limitations bars a claim by a participant for his vested interest, which cannot inure to his employer, no matter when the claim is brought after the bar and that therefore the Employer/Trustee may keep the money? If it is "vested" can it ever be taken away from him, and if the time should come when the participant or his beneficiary cannot bring an action to recover it, with the "non-inurement" statutory provision, it would appear to mean that what was the "vested" benefit should be escheated to the state. With the statutory requirement that the assets be held for the "exclusive benefit of the participant and his beneficiaries" does this mean that the benefit may never escheat to the state and that any person with sufficient standing to sue can always bring an action to recover the benefits? And if the time should come when there is no person to claim the benefit from the trust, and it cannot inure to the benefit of the employer, should it be redistributed to the other participants who can press a claim? With everybody's claim time-barred by this time, would this create a situation of a dog chasing its tail? Or is it better for the Supreme Court to grant the Petition for the Writ and have the impasse created by the Third Circuit resolved by a ruling that in this case the claims of the Plaintiff Class, under the law, are viable?

Since this is a trust fund at least in part governed by Pennsylvania law, the trustee can be relieved of any perpetual exposure or obligation by using a state court in Pennsylvania to file an account of its administration of the trust, and give

appropriate notices to the participants, and obtain an adjudication of its account relieving it of any further liability. But that should not be necessary in this proceeding since claims have been made for the vested benefits.

Because of these statutory provisions adopted by Congress it appears that only the Supreme Court can resolve them and establish national policy and that the Petition for Writ of Certiorari should be granted.

IV. Applicability Of Tax Law

The Supreme Court should grant the Petition for Writ of Certiorari to review a Decision of the Third Circuit on an important question of federal law that has not been, but should be, settled by the Supreme Court.

Judges Becker and Alito, two of the three judges who were members of the panel of the Third Circuit who decided the *Kuhns* case, had previously written that " '... [a]ll qualifying pension plans contain the assurance required by this section [IRC §411(d)(3)(A)]. Plaintiffs can then sue on the basis of the plan language.' " Alito, J., Concurring Opinion in *Gluck v. Unisys Corp.*, 960 F.2d 1168, at p. 1186 (3rd Cir. 1992), quoting Judge Becker in *Bruch v. Firestone Tire and Rubber Co.*, 828 F.2d 134, at p. 151 (3rd Cir. 1987), *aff'd in part, rev'd in part*, 489 U.S. 101, 109 S.Ct. 948, 103 L.Ed. 2d 80 (1988). Judge Alito went on to write that the plan provision there being discussed was obviously inserted or used to satisfy IRC §411(d)(3)—a "partial termination" provision relevant there but not relevant here—and that it "... was meant to have the same meaning as the same term in IRC §411(d)(3) and related tax regulations and rulings. *Thus Treas. Reg. §1.411(d)-2(b) is fully applicable here.*" at p. 1168 (Appendix at page 16a). (Emphasis added.)

This concept is of tremendous importance. A half century of tax legislation, regulations, rulings, and administrative practices, and the experience of employers, employees, and practioners with them, can be drawn into adjudicating problems under the private American retirement system if what has heretofore been limited to tax problems relating to it, can be used in private disputes. While it may be commonly thought, particularly by persons not trained in the law, that tax law fully governed or regulated employee benefit programs, even before or without ERISA, it is not generally understood by laymen that tax law in this context does not provide private rights and is concerned only with taxation and the protection of the federal revenues. Now if all of this is to be made applicable, much of what has been disputed in this area can be resolved by familiar standards and legal requirements.

It appears clear that the problems in the *Kuhns* case could be more readily resolved if the principles and provisions of tax law relating to pension and profit sharing plans were to be applied here. Consider the provisions of Treas. Reg. §1.401-1(b)(3) and IRS Rev. Rul. 69-295 (both *supra*). Both ruled that, as stated in the Regulation,

> "... [a] stock bonus or profit-sharing plan is not a plan for the exclusive benefit of employees in general if the funds therein may be used to relieve the employer from contributing to a pension plan operating concurrently and covering the same employees."

(This regulation (in effect in 1970-1971, prior to ERISA) uses the old numbering system which was changed after ERISA went into effect.) If this could have been used as the basis of the action in *Kuhns* for private relief it is suggested that both the District Court and the Circuit Court would have had a better understanding of the claim and the complaint about the violation of the law. While §1103(c) of ERISA mandates the

"non-inurement" and the "exclusive benefit" rules, the amplification of them by the tax Regulation and Revenue Ruling would make them more meaningful. The illegality of the "taking" of the assets from the Profit Sharing Trust by the Respondent Employer/Trustee/Bank to pay its own obligation to fund the Pension Trust would have been thoroughly clear. The participants in the trust fund should not have to protect their own rights by relying on an audit of the tax returns by the Internal Revenue Service which may not inquire into a matter of this kind or could even be misled. Congress has left the enforcement of ERISA largely to the participants; our democratic system of government does not envision a federal policeman examining every transaction in an employee benefit plan. This is especially true under ERISA where under 29 USC §1103(a) the assets ".. shall be held in trust by one or more trustees." Congress used the ancient system of trusts and the common law of trusts for this purpose. (See *NLRB v. Amax Coal Co.*, 453 U.S. 322, 1015 S.Ct. 2789, 69 L.Ed. 2d 672 (1981), for example.) The greater breadth and depth of the tax law, and a half century of experience, should be used to give meaning to the similar or identical provisions of ERISA.

But there is no authoritative ruling that tax law shall be applied to a private dispute such as the one at bar. Even though Judges Becker and Alito would apply IRC provisions to settle the dispute in *Bruch* and *Gluck*, they did not do it in *Kuhns*. If all of the standards of the "exclusive benefit" rule under the IRC were to be applied to the "non-inurement" and "exclusive benefit" rules under ERISA, the problem in *Kuhns* could have been more easily and more readily resolved. There is a large body of jurisprudence in the tax law to be added to employee benefit plan law to resolve disputes as distinguished from tax disputes if the Supreme Court should endorse these concepts and make them national policy. That is another reason why the Petition for the Writ should be granted.

CONCLUSION

The Petition for Writ of Certiorari should be granted to obtain definitive rulings from the Supreme Court to make it possible to have uniform decisions in all of the Circuit Courts of Appeals on the question of a "continuing violation" of ERISA, to co-ordinate the "non-inurement" rule with the Statute of Limitations, to clarify the meaning of "vested" in an employee benefit plan, and to make it possible to apply Internal Revenue Code and Regulations standards to the resolution of private disputes under ERISA.

Respectfully submitted,

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NOT-FOR-PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

NOS. 94-1839 and 94-1869

RUTH J. KUHNS; BLAKE C. HEFFNER; WILLIAM W. SHELLHAMMER, on behalf of themselves and all others similarly situated

v.

MERIDIAN BANCORP, INC., successor to THE FIRST NATIONAL BANK OF ALLENTOWN

Ruth J. Kuhns, Blake C. Heffner and William W. Shellhammer, for themselves and as representatives of the Plaintiff Class, Appellants in No. 94-1839

RUTH J. KUHNS; BLAKE C. HEFFNER; WILLIAM W. SHELLHAMMER, on behalf of themselves and all others similarly situated

v.

MERIDIAN BANCORP, INC., successor to the FIRST NATIONAL BANK OF ALLENTOWN,

Meridian Bancorp, Inc., successor to the First National Bank of Allentown, Appellant in No. 94-1869

On Appeal From the United States District Court For the
Eastern District of Pennsylvania
D.C. Civ. No. 92-cv-04065
District Judge: Honorable Edward N. Cahn, Chief Judge

Argued: July 26, 1995

Before: BECKER, NYGAARD, and ALITO,
Circuit Judges.

(Filed SEP 8 - 1995)

OPINION OF THE COURT

BECKER, *Circuit Judge.*

Plaintiffs, Ruth J. Kuhns, Blake Heffner and William W. Shellhammer, have appealed from a judgment of the district court granting summary judgment for defendant, Meridian Bancorp, Inc. ("Meridian"), on certain state law and ERISA claims brought against Meridian by plaintiffs on their own behalf and on behalf of a class of others similarly situated. More particularly, the district court held that the plaintiffs' state law claims were barred by laches and that their ERISA claims were barred, in part, by the statute of limitations. After a bench trial, the court held that plaintiffs were not entitled to both a retirement benefit and a profit sharing benefit as they claimed, but determined that the benefits to which they were entitled should be recalculated using an interest rate of 7.4%. This was because of the district court's view that the 4% interest rate provided in the defined benefit plan was too low. Meridian has cross-appealed from the court's failure to bar all of the plaintiffs' untimely claims, its refusal to apply ERISA's non-retroactivity provisions, and its imposition of a 7.4% in-

terest rate. On the plaintiffs' appeal, we affirm; on Meridian's appeal, we reverse.

I

The etiology of plaintiffs' cause of action is the decision made way back in 1970 by the First National Bank of Allentown, Meridian's predecessor, concerning its employee benefits package. At that time, the bank switched from a defined contribution (profit sharing) plan to a defined benefit plan (the changes were effectuated in 1971). In adopting this change in plans, the company attempted to preserve the account balances of plan participants (at the time of the change in plans) by offering a choice to retiring employees between participation in the defined benefit plan or their 1971 account balance compounded to the date of their retirement at an annual rate of return of 4%.[1] This offer was instituted for all bank employees (including all the plaintiffs in this action) and detailed information about the plan was provided to all the plaintiffs in 1971. In 1981, the defendant raised the percentage to 5% retroactive to 1/1/76. The defined benefit plan was established to replace (not supplement) the profit sharing plan, which, in the bank's judgment, had provided inadequate benefits for the bank's employees. Notwithstanding this fact, and the fact that all the bank's employees were notified of the changes (and that one of the plaintiffs, Mr. Shellhammer, was a "key player" in connection therewith,[2] it was not until 1991, over twenty years

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1. More precisely, the defined benefit plan provided a retirement benefit equal to the "greater of" (a) a defined benefit based on the employees' total years of service (including service *before* the profit sharing plan existed) and the employees' final average pay before retirement; *or* (b) a lifetime annuity based on the value of the employees' account balances in the now-replaced profit sharing plan compounded at a rate of 4% interest.

2. Shellhammer attended the meeting of the pension trustees on November 21, 1970, where Beyer-Barber, a consulting firm retained by the bank, recommended to the plan trustees to convert their Profit Sharing plan to a defined benefit pension plan. Indeed, Shellhammer *presented* the trustees' recommendations to

after the 1970 bank action, that these plaintiffs brought the present lawsuit in which they claim that they are entitled to *both* the enhanced defined benefit and the profit sharing benefit it replaced. Indeed, plaintiffs allege repeatedly in their brief that the bank "embezzled" their money. This allegation is patently false, and is symptomatic of the failings of their lawsuit.[3]

We need not recount in great detail either the additional factual background or procedural history of this case, since it is well known to the parties. Additionally, we do not discuss those aspects of this case in which plaintiffs' claims were rejected by the district court, for in those respects we affirm essentially for the reasons set forth in its opinions.[4] Rather, we limit our discussion to the issues raised in the cross-appeal.

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convert the plan on December 21, 1970 to the bank's board of directors on behalf of the trustees. Additionally, on a separate occasion in 1980, the bank provided Shellhammer with pension calculations reflecting the interest rate credited to his profit sharing account. Moreover, plaintiff Heffner testified that he complained about the transaction as early as 1971, but decided it was not in his "best interest" to pursue it at the time. Finally, plaintiff Kuhns retained counsel in 1986 and through counsel raised many of these issues with the bank at that time: like the other bank employees, she was given detailed information about the transaction in 1971.

More specifically (on the latter point), the transaction involving the Pension Plan and its use of the Profit Sharing Plan's assets was announced in an employee news bulletin and explained by Shellhammer and others at employee meetings. It was described in the Bank's 1971 Annual Report and at the annual shareholders' meeting, where Shellhammer was designated to answer questions. A benefit booklet was distributed to all employees explaining how the Profit Sharing Plan's assets would receive [sic] be used as partial funding for the benefits under the new plan. The employees were also told they would receive only one retirement benefit, not two.

3. Neither, despite the vigor into which it is advocated, have the plaintiffs made a colorable showing that the transaction, to the extent that it had to be approved by the Internal Revenue Service, was not in fact approved. The delay in bringing this action has contributed to the uncertainty in this area, for many of the relevant documents have been lost or discarded.

4. We reject Meridian's contention, however, that plaintiffs waived their right to appeal the district court's dismissal of their state law claims.

II

While dismissing all but Shellhammer's claim on statute of limitations grounds, *see infra,* the district court concluded that the plaintiffs' claims were viable as to the amount of their monthly pension checks received within ERISA's three year statute of limitations.[5] For instance, since this case was brought on July 13, 1992, Kuhns could, in the district court's view, recover for the interest rate differential attributable to all pension payments made after July 13, 1989 (the date before which such claims would be barred by the applicable three year statute of limitations of ERISA §1113).

In reaching this conclusion the district court incorrectly relied on the "continuing violation" rationale of the Ninth Circuit opinion in *Meagher v. International Association of Machinists & Aerospace Workers Pension Plan,* 856 F.2d 1418 (9th Cir. 1988). In that case, the Ninth Circuit analyzed when a plan amendment phasing out a living pension feature of a company's pension plan gave rise to a cause of action under ERISA §1054(g)(1) (which provides for a cause of action against a plan when a participant's "accrued benefits were 'decreased by an amendment.' ") *Id.* at 1422 (quoting ERISA §1054(g)(1)). In *Meagher,* the Ninth Circuit reversed the

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5. Section 1113 of ERISA provides:

> No action may be commenced under this subchapter with respect to a fiduciary's breach of any responsibility, duty, or obligation under this part, or with respect to a violation of this part, after the earlier of
>
> (1) six years after (A) the date of the last action which constituted a part of the breach or violation, . . . or
>
> (2) three years after the earliest date on which the plaintiff had *actual knowledge of the breach or violation;*
>
> except that in the case of fraud or concealment, such action may be commenced not later than six years after the date of discovery of such breach or violation.

district court's "assumption that the violation in this case was the enactment of the amendment." *Id.* The court reasoned:

> Meagher's cause of action accrued only when his accrued benefits were "decreased by an amendment of the plan, other than an amendment described in section 1082(c)(8) of this title." 29 U.S.C. §1054(g)(1). The district court suggests that passage of the inoperative amendment, or when Meagher found out the amendment was passed, was the precise accrual date. We disagree. Meagher was harmed only by the wrongful *application* of the amendment. Only then were his accrued benefits *decreased*. The passage of the amendment was not a violation of ERISA . . . .

856 F.2d at 1422. The result in *Meagher* emanates from the particular language of §1054(g)(1) requiring that a participants [sic] benefits actually be "decreased" before the participant's cause of action could accrue.

In contrast, the plaintiffs' claim in this action are [sic] brought under ERISA §1104(a), which provides that a fiduciary "shall discharge his duties with respect to a plan solely in the interest of the participants" and ERISA §1103(c), which provides that "the assets of the plan shall never inure to the benefit of any employer and shall be held for the exclusive purpose of providing benefits to the participants." These sections, unlike §1054(g)(1), do not require that a participant's benefits be "*decreased* by an amendment to the plan." Rather, the plaintiffs in this action would have had a cause of action under these sections at any time the facts were sufficient to make out a claim that the defendant was improperly using plan assets. Facts sufficient to make out such a claim would have been available from 1971 forward, when the profit sharing plan was converted to a defined benefit plan. Thus, Shellhammer's claims is also time barred under §1113 of ERISA.

III

The district court relied on the applicable three year statute of limitations in §1113 of ERISA to dismiss all but one of the plaintiffs' actions (Shellhammer's) given that all plaintiffs except Shellhammer retained counsel and raised the issues implicated in this appeal with the defendant's general counsel in 1986, more than three years before this case was brought in 1991. *See* Dist. Ct. Op. 28-32. The district court erred, however, in failing to also dismiss the claim of Shellhammer, who was a fairly high-ranking employee whose extensive involvement in the 1970 decisions is chronicled *supra* at n.2.

Notwithstanding Shellhammer's extensive knowledge regarding the 1970 transaction, the district court, relying on our opinion in *Gluck v. Unisys Corp.*, 960 F.2d 1168, (3d Cir. 1992), rejected the defendant's contention that Shellhammer had "actual knowledge of a breach or violation" under ERISA §1113(2):

> [T]his court finds that Shellhammer did not have actual knowledge of the putative breaches more than three years before the plaintiff initiated the lawsuit. Although Shellhammer attended the meetings where the trust modifications were discussed and made the presentation to the Board of Directors, he did not have the requisite knowledge that *Gluck* requires. Indeed, Shellhammer is the quintessential example of a participant who would have actual knowledge under the *Blanton* test—he had knowledge of the underlying facts but did not have knowledge of the law. Since that test has been expressly rejected by the Third Circuit Court of Appeals, more information is needed to determine whether Shellhammer had actual knowledge.

Dist. Ct. Op. at 32. While our decision in *Gluck* is admittedly opaque, we believe the district court misreads its requirements of "actual knowledge." The district court stated:

> the *[Gluck]* court emphasized that its holding "does not mean the statute of limitations can never begin to run until a plaintiff first consults with a lawyer." This language suggests that participants who do not consult with an attorney will usually be deemed not have [sic] actual knowledge under §1113(2) because in all probability they will not be aware that the transactions gave rise to an ERISA violation.

Dist Ct. Op. at 28 (citation omitted).

Analyzed properly under the language of *Gluck*, Shellhammer *did* have actual knowledge. In particular, he had "actual knowledge of all material facts necessary to understand that some claim exists." *Gluck*, 960 F.2d at 1177. From the outset of the transaction in 1970, Shellhammer was aware that the profit sharing accounts of participants were going to be preserved through a set percentage rate of 4%. Such knowledge constituted "knowledge of all relevant facts at least sufficient to give the plaintiff knowledge that a fiduciary duty has been breached or ERISA provision violated." *Gluck*, 960 F.2d at 1178. This is all that *Gluck* requires.

IV

The result of the foregoing discussion is that all of plaintiffs' claims must be dismissed.[6] Accordingly, we need not reach the questions, presented by the cross-appeal, whether the district court applied improper legal standards and abused

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6. In reversing the district court's order as to the issue raised in Meridian's cross-appeal, we need not reach Meridian's contentions that ERISA's non-retroactivity provisions bar the plaintiffs' ERISA claims and the district court erred by not dismissing the plaintiffs' ERISA claims based on laches. These contentions appear to have merit and would be alternate grounds for reversal on the cross-appeal.

its discretion in selecting the 7.4% rate or erred by imposing a post-retirement interest credit. The judgment of the district court insofar it is challenged in No. 94-1839 will be affirmed, but insofar as it is challenged in 94-1869, will be reversed, and the case remanded to the district court with directions to enter judgment for the defendants on all counts.

TO THE CLERK:

Please file the foregoing opinion.

BY THE COURT:

/s/Becker, Circuit Judge

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action

No. 92-4065

RUTH J. KUHNS, *et al.*

v.

MERIDIAN BANCORP, INC., successor to THE FIRST NATIONAL BANK OF ALLENTOWN

ORDER

CAHN, C.J., August 8, 1994

AND NOW, this 8th day of August, 1994, in accordance with prior Opinions of this court in the instant case and upon consideration of pending motions, it is ORDERED:

1. Final Judgment is hereby entered in favor of Ruth J. Kuhns and against Meridian Bancorp, Inc. as follows:

(a) Meridian shall pay Ruth J. Kuhns a retirement benefit of $548.21 per month commencing July 13, 1989 until her death;

(b) Meridian may take credit for any retirement benefits previously paid to Ruth J. Kuhns after July 13, 1989 but must make appropriate adjustments in her favor for any cost of living increases;

(c) Interest on the arrearages shall be paid at 7.4% compounded annually as to the monthly amounts unpaid after July 13, 1989. As of August 31, 1994, the arrearages plus interest total $18,244.63;[1]

---

1. On pages 9 and 10 of the Opinion of July 20, 1994, I stated that interest on the arrearages should accrue from date of retirement. That was incorrect. Interest should accrue from July 13, 1989 because of the bar of the statute of limitations.

(d) Meridian shall maintain a profit-sharing account balance for Ruth J. Kuhns as of September 1, 1986 of $69,604.63. Meridian shall provide a death benefit for Ruth J. Kuhn's beneficiary in that amount plus interest at 7.4% compounded annually, from September 1, 1986, less any retirement benefits actually paid to her.[2]

2. Final judgment is hereby entered in respect to all of the claims of Blake C. Heffner as follows:

(a) Judgment is hereby entered in favor of Meridian Bancorp, Inc. and against Blake C. Heffner in regard to all of his claims except as to the claim set forth in subparagraph (b) infra; and

(b) Meridian shall maintain a profit-sharing account balance for Blake C. Heffner as of March 1, 1990, of $117,721.00. Meridian shall provide a death benefit for Blake C. Heffner's beneficiary in that amount plus interest at 7.4% compounded annually from March 1, 1990, less the profit-sharing portion of each monthly pension payment he actually receives *(see* n. 10 in Opinion of July 20, 1994).

3. Final judgment is hereby entered in respect to all of the claims of William W. Shellhammer as follows:

(a) Judgment is hereby entered in favor of Meridian Bancorp, Inc. and against William W. Shellhammer in regard to all of his claims except as to the claim set forth in subparagraph (b) infra; and

(b) Meridian shall maintain a profit-sharing account balance for William W. Shellhammer as of August 1, 1981, of $83,917.31. Meridian shall provide a death benefit for

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2. It should be noted that the monthly benefit of $548.21 to be paid to Ruth J. Kuhns already includes an interest factor of 7.4% compounded annually.

William W. Shellhammer's beneficiary in that amount plus interest at 7.4% compounded annually from August 1, 1981 less the profit-sharing portion of each monthly pension payment he actually receives (*see* n. 10 in Opinion of July 20, 1994).[3]

4. All other pending Motions are Denied.

5. The judgments entered in the above paragraphs are hereby certified for immediate appeal pursuant to Fed. R. Civ. P. 54(b). The court relies upon the following factors in making the certification pursuant:

(a) All claims subject to certification have been adjudicated to finality, and there is no further action the court can take with respect to these claims;

(b) All claims of the class representatives have been adjudicated to finality, and there is no further action the court can take with respect to these claims;

(c) There are no other claims remaining for adjudication in this court except for the calculations of pension benefits, if any, of retired class members and beneficiaries of deceased members. These calculations will be costly and time consuming and may be unnecessary depending on the proceedings before the Court of Appeals;

(d) There is no possibility that the need for review of the certified judgments might be mooted by future developments in this court;

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3. In the July 20, 1994 Opinion, I observed that Shellhammer was not entitled to any relief because his profit-sharing account balance would have been "exhausted." I did not recognize that he is entitled to receive 7.4% interest compounded annually on his account balance and therefore a death benefit may still be available for his beneficiary.

(e) There is no apparent possibility that the Court of Appeals would be required to consider the same issues a second time in any later appeals;

(f) There is no counterclaim or any other claim which would result in a set-off against the judgments sought to be made final; and

(g) It is in the interests of the parties, particularly the retiree plaintiffs who are of advanced age, that the judgments be reviewed as promptly as possible and not be delayed until all of the class members' individual claims for benefits are adjudicated. Because of the composition of the class and the nature of the claims and the defenses involved, this is an infrequent harsh case which requires immediate appeal before the remaining claims are adjudicated.

BY THE COURT:
/s/Edward N. Cahn, C.J.

ENTERED 8/9/94
CLERK OF COURT

GLUCK et al.

v.

UNISYS CORPORATION et al.
United States Court of Appeals
Third Circuit
960 F.2d 1168 (1992)

Before MANSMANN and ALITO, Circuit Judges, and DIAMOND, District Judge for the Western District of Pennsylvania, sitting by designation.

BY MANSMANN

• • • •

If the 1984 transfer of assets to a new plan did impermissibly decrease benefits, and if the 1984 amendment did wrongfully channel funds from the plan to the company, then, absent fraud or concealment, the six-year limitations period would have begun to run at the time the 1984 amendment was adopted. The three-year limitations period would run only from the time an employee actually knew of the violation. That actual knowledge cannot always be implied from mere knowledge of the changes to the plan.

Because the district court located both the possible violations of ERISA and the employees' actual knowledge of them in the 1984 amendments alone, we will reverse the dismissal of the employees' fiduciary claims and remand for a finding of the date when each employee had actual knowledge of all material facts relevant to a partial termination claim.

• • • •

The Non-Fiduciary Claims

Although ERISA provides a specific limitations period for breaches of fiduciary obligations, the Act does not set any

limitations period for non-fiduciary claims brought pursuant to its civil enforcement provision, 29 U.S.C. §1132. As a general rule, when Congress omits a statute of limitations for a federal cause of action, courts " 'borrow' the local time limitation most analogous to the case at hand." *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 111 S.Ct. 2773, 2778, 115 L.Ed.2d 321 (1991). In the absence of an applicable ERISA limitation, the courts thus apply the statute of limitations for the state claim most analogous to the ERISA claim pursued. *See, e.g., Vernau v. Vic's Market, Inc.*, 896 F.2d 43, 45 (3rd Cir. 1990).

* * * *

ALITO, Circuit Judge, concurring.

I join the opinion of the Court, but I write separately to explain my understanding of the importance of tax regulations and rulings in an ERISA case involving a partial termination claim.

Under the Internal Revenue Code, a "qualified" trust (IRC §401) enjoys substantial tax advantages. Under IRC §411(d)(3)(A), a trust is not "qualified" unless "the plan of which such trust is a part provides that . . . upon its termination or partial termination . . . the rights of all affected employees to benefits accrued to the date of such termination [or] partial termination . . . to the extent funded as of such date, or the amounts credited to the employees' accounts, are nonforfeitable." "As a result of this provision, all qualifying pension plans contain the assurances required by this section. Plaintiffs can then sue on the basis of the plan language." *Bruch v. Firestone Tire and Rubber Co.*, 828 F.2d 134, 151 (3d Cir. 1987), *aff'd, in part, rev'd, in part*, 489 U.S. 101, 109 S.Ct. 948, 103 L.Ed.2d 80 (1988). This is precisely what took place in the present case. The plan at issue—presumably for the purpose of obtaining "qualified" status and the concomitant tax advantages—con-

tains the assurances required by IRC §411(d)(3)(A), and the plaintiffs are suing to enforce those assurances.

Since the plaintiffs seek enforcement of a plan provision that echoes the language of and was obviously inserted to satisfy IRC §411(d)(3), it seems clear that the term "partial termination" in the plan was meant to have the same meaning as the same term in IRC §411(d)(3) and related tax regulations and rulings. Thus, Treas. Reg. §1.411(d)-2(b) is fully applicable here. Furthermore, because of the Internal Revenue Service's statutory responsibilities, expertise, and experience in detecting partial terminations, an IRS determination that a partial termination has or has not occurred in a particular case, under either the "general rule" or the "special rule" (Treas. Reg. §1.411(d)-2(b)(1) and (2)), should be accorded deference by the courts.

MEAGHER

v.

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS PENSION PLAN;

United States Court of Appeals, Ninth Circuit.

856 F.2d 1418 (1988)

[Footnotes deleted]

Before SNEED, HUG and KOZINSKI, Circuit Judges

HUG, Circuit Judge:

Plaintiff Frank Meagher appeals from the district court's award of summary judgment in favor of the International Association of Machinists and Aerospace Workers Pension Plan ("the Plan") and the Plan's trustees. The district court held that Meagher's action was barred by the applicable statute of limitations under the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §1113 (1982). We reverse the district court's judgment.

I

Frank Meagher was an officer of the International Association of Machinists and Aerospace Workers ("IAM") for 20 and one-half years prior to his retirement on July 1, 1977. The organization, as an employer, administered an employee pension plan for the officers, organizers, and support staff it employed. Meagher's rights under the Plan had fully vested and accrued years prior to his retirement. The Plan contained a "living pension" feature that increased the monthly benefit payments proportionately to any future salary increases for the position from which the pensioner retired. Thus, under this provision, Meagher's pension benefits were tied to the current salary of the job he held before he retired. *See Shaw v. Int'l. Assoc. of Machinists and Aerospace Workers Pension Plan*, 750

F.2d 1458, 1459-60 (9th Cir.) (explaining the living pension feature, *cert. denied*, 471 U.S. 1137, 105 S.Ct. 2678, 86 L.Ed.2d 696 (1985).

In September, 1976, the delegates to the 1976 IAM convention voted to amend the pension plan to phase out the living pension feature. Under the amendment, the living pension increases were to be progressively cut back from January 1, 1979 on, and were scheduled to end January 1, 1985. In February, 1979, soon after the Plan's trustees began implementing the phase-out, letters were sent to all retirees explaining the effect of the amendment upon their benefits. In October, 1979, the trustees sent Summary Plan Descriptions to all plan participants, describing how the living pension feature was being phased out. The cover letter stated that the Plan had been qualified by the IRS and had been "revised to comply with [ERISA]."

On December 1, 1981, a plan participant, Edward Shaw, filed a class action in federal district court against the Plan and its trustees, challenging the application of the amendment. Shaw, who had retired on January 1, 1975, brought the action individually and on behalf of those similarly situated. The district court in that action found that "the actions of defendants in attempting to phase-out the living pension feature in the pension plan were not justified under ERISA...." *Shaw v. International Ass'n of Machinists-Aerospace*, 563 F.Supp. 653, 657 (C.D.Cal.1983). We affirmed on January 11, 1985. *See Shaw*, 750 F.2d at 1466.

Our analysis in *Shaw* focused on 29 U.S.C. §1054(g)(1), which provides: "The accrued benefit of a participant under a plan may not be decreased by an amendment of the plan, other than an amendment described in section 1082(c)(8) of this title." 29 U.S.C. §1054(g)(1) (1982). Section 1082(c)(8) sets forth certain criteria an amendment must satisfy in order to

reduce accrued benefits. One criterion is that the amendment must meet with the approval of the Secretary of the Treasury. 29 U.S.C. §1082(c)(8) (1982). The Secretary may approve the amendment only if he determines that it is "necessary because of a substantial business hardship." *Id.* The trustees had not obtained the Secretary's approval by the time of the *Shaw* case, nor have they obtained it since. Under the plain language of section 1082(c)(8), "No amendment ... which reduces the accrued benefits of *any* participant *shall take effect*" unless the Secretary approves it. (Emphasis added.) Because an amendment cannot take effect without the Secretary's approval, it cannot be applied to reduce the accrued benefits of any participant under the Plan, as specified in 29 U.S.C. §1054 (g)(1). The amendment is simply inoperative, and the Plan must be administered without giving any effect to the amendment.

In *Shaw*, we had to determine first whether the living pension feature was, indeed, an accrued benefit, for the prohibition of section 1054(g)(1) applies only to the reduction of "accrued benefits," and the Secretary's approval, as provided for in section 1082(c)(8), is necessary only for amendments which reduce the "accrued benefits" of any participant. We determined in *Shaw* that the living pension feature was an accrued benefit, stating: "[The] entire [IAM] pension benefit—including the living pension feature—was promised, anticipated, and *accrued.*" *Shaw*, 750 F.2d 1466 (emphasis added). We noted the Supreme Court's statement that " 'Congress through ERISA wanted to ensure that "if a worker has been *promised a defined pension benefit* upon retirement—and if he has fulfilled whatever conditions are required to obtain a vested benefit—... he actually receives it." ' " *Shaw*, 750 F.2d at 1465, *quoting Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 510, 101 S.Ct. 1895, 1899, 68 L.Ed.2d 402 (1981).

Because the amendment was one that decreased accrued benefits and the Secretary's approval was not obtained, we held that the amendment did not take effect. Having made this determination, it was clear that the amendment could not be applied to *anyone* because the amendment had not taken legal effect, and, indeed, could not take effect until the Secretary's approval had been obtained in accordance with 29 U.S.C. §1082(c)(8). We stated in *Shaw:*

> The IAM declined to take advantage of the statutory escape valve that allows the Secretary to approve amendments decreasing accrued benefits upon a showing of substantial business hardship. 29 U.S.C. §1082(c)(8). Perhaps the IAM can now submit its discussion of financial hardship, which is irrelevant to our decision, to the Secretary. We see no time limit on applications brought under that escape valve section.

Shaw, 750 F.2d at 1465. The IAM to this day has not done so and, thus, the amendment still has not taken effect.

Following our decision, the parties to *Shaw* submitted, apparently on their own initiative, a program of compliance with the *Shaw* judgment. The defendants agreed to apply prospectively the living pension feature to all participants who, like Shaw, had retired prior to January 1, 1977, and to also reimburse those retirees for the past adjustments they were entitled to but did not receive. *See* ER 9-10. The parties, however, agreed that these measures would be taken with respect to the pre-January 1, 1977 retirees only—the class of litigants in *Shaw*—and not to any other retirees. They then requested the district court to confirm the essential portions of the program of compliance, which it did by issuing an order outlining the program. The trustees continued to apply the ineffective amendment to Meagher and others who were not *Shaw* litigants. This of course, was in violation of section

1054(g)(1). The trustees could not legally apply the amendment to anyone until it had taken effect by virtue of the Secretary's approval.

The trustees disclosed the *Shaw* litigation to the plan beneficiaries in a letter dated February 14, 1986. The letter stated, "Please note that *the judgment applies only to pensioners who retired before January 1, 1977, and their beneficiaries.*" (Emphasis in original.) Ten days later, Meagher wrote to one of the trustees asking why the *Shaw* judgment did not also apply to him. The trustee wrote back, simply reiterating the trustees' previous position that the *Shaw* ruling applied only to those who retired prior to January 1, 1977.

About two months later, on May 13, 1986, Meagher filed this action in federal district court. He claimed that the application of the amendment to reduce his accrued benefits violated section 1054(g)(1) of ERISA as determined by *Shaw*. He sought a declaratory judgment that the application of the amendment was a violation of ERISA and a judgment ordering the trustees to pay to him the amount of benefits he is entitled to receive without application of the amendment.

The parties filed cross-motions for summary judgment, and the district court granted the defendants' motion. It did so on the basis that the applicable statute of limitations under ERISA, 29 U.S.C. §1113, barred Meagher's action. Meagher appealed. We exercise our jurisdiction under 28 U.S.C. §1291 (1982). Our review is *de novo*. *Darring v. Kincheloe*, 783 F.2d 874, 876 (9th Cir. 1986).

II

The statute of limitations, 29 U.S.C. §1113, provides as follows:

§113. Limitation of actions

> (a) No action may be commenced under this title with respect to a fiduciary's breach of any responsibility, duty, or obligation under this part, or with respect to a violation of this part, after the earlier of—
>
> (1) six years after (A) the date of the last action which constituted a part of the breach or violation, or (B) in the case of an omission, the latest date on which the fiduciary could have cured the breach or violation, or
>
> (2) three years after the earliest date (A) on which the plaintiff had actual knowledge of the breach or violation, or (B) on which a report from which he could reasonably be expected to have obtained knowledge of such breach or violation was filed with the Secretary under this title;
>
> except that in the case of fraud or concealment, such action may be commenced not later than six years after the date of discovery of such breach or violation.

To apply the limitations period, we must first isolate and define the underlying violation upon which Meagher's claim is founded. The district court proceeded on the assumption that the violation in this case was the enactment of the amendment. It noted that Meagher had to have been aware of the amendment at least by October 10, 1979 because the trustees sent a letter on that date to all plan participants explicitly informing them ~~of the~~ amendment. The court explained, "At that time Meagher had knowledge of the events which gave rise to his cause of action."

Applying the six-year period, the court found that Meagher's time for filing suit expired in October of 1985, seven months before Meagher filed his action.

Meagher's cause of action accrued only when his accrued benefits were "decreased by an amendment of the plan, other than an amendment described in section 1082(c)(8) of this

title." 29 U.S.C. §1054(g)(1). The district court suggests that passage of the inoperative amendment, or when Meagher found out the amendment was passed, was the precise accrual date. We disagree. Meagher was harmed only by the wrongful *application* of the amendment. Only then were his accrued benefits *decreased*. The passage of the amendment was not a violation of ERISA; an amendment must be adopted before it may even be submitted to the Secretary for approval.

III

Meagher's claim is brought under 29 U.S.C. §1132(a)(1)(B) (1982), which provides:

> A civil action may be brought ... by a participant or beneficiary ... to recover benefits due him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan....

ERISA charges the trustees and fiduciaries with the duty to administer the pension plan "in the interest of the participants and beneficiaries and ... in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of [ERISA]." 29 U.S.C. §1104(a)(1)(D) (1982).

Despite our holding in *Shaw*, the trustees have continued to apply the inoperative amendment to all but *Shaw* litigants. This is a denial of benefits to which Meagher was, and will become, entitled and with respect to which he seeks "to recover ... [and] to enforce his rights under the terms of the plan...." 29 U.S.C. §1132(a)(1)(B). Each check issued to him in an amount reduced under the inoperative amendment constitutes a fresh breach by the trustees of their duty to administer the pension plan in accordance with the documents and instruments of the Plan that are not inconsistent with ERISA, as required by 29 U.S.C. §1104(a)(1)(D). A separate

cause of action arises with the issuance of each check, and the limitations period runs separately for each cause of action.

The limitations period is six years from the breach or violation, or three years from Meagher's knowledge of the breach or violation, whichever is earlier. 29 U.S.C. §1113(a). We have held that the "statute of limitations is triggered by [a claimant's] knowledge of the transaction that constituted the alleged violation, not by [his] knowledge of the law." *Blanton v. Anzalone*, 760 F.2d 989, 992 (9th Cir. 1985). Each time Meagher received a check, he had knowledge of the transaction, though he may not have known at the time that the reduction in benefits was unlawful under ERISA.

Thus, the issuance of each check commenced a six-year period and Meagher's receipt of the check commenced a three-year period. Since the three-year period expires earlier, it is the one we apply. 29 U.S.C. §1113(a)(2). Meagher brought this action on May 13, 1986. To determine how many breaches are actionable, we calculate three years back from May 13, 1986. Meagher's claims are thus timely for all checks issued since May 13, 1983. Meagher has stated timely claims under 29 U.S.C. §1132(a)(1)(B) to recover benefits due him under the Plan.

CONCLUSION

In *Shaw*, we held that the amendment to the pension plan reduced accrued benefits and was inoperative until approved by the Secretary of the Treasury. No approval has since been obtained, and we hold that the amendment remains inoperative to all participants. Meagher's action for recovery of benefits is timely as to all benefits withheld since May 13, 1983 and as to the declaration of future benefits.

We reverse and remand for proceedings consistent with this opinion.

REVERSED AND REMANDED.

MORRISSEY v. CURRAN

567 F.2d 546 (1977)

U.S. Court of Appeals, Second Circuit

[Footnotes deleted.]

JAMES M. MORRISSEY and RALPH IBRAHIM, individually and on behalf of the members of the National Maritime Union of America v. JOSEPH CURRAN, as President of the National Maritime Union of America, as a trustee of the NMU Pension & Welfare Plan and individually, et al., No. 77-7259, Dec. 8, 1977.

Before LUMBARD, FEINBERG and
GRAAFEILAND, Circuit Judges.

FEINBERG, Circuit Judge.

Plaintiffs James M. Morrissey and Ralph Ibrahim, members of the National Maritime Union of America, appeal from a decision of the United States District Court for the Southern District of New York, Robert J. Ward, J., dismissing on jurisdictional grounds their amended complaint against various officers of the Union and the trustees and administrator of the NMU Pension & Welfare Plan ("the Plan"). Because we believe that under the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §1001 et seq., jurisdiction exists as to at least one of the transactions alleged in the complaint, we reverse for further proceedings.

I

As the district judge rightly put it, this litigation has had "a lengthy history." The earlier manifestations, summarized in the margin, need not concern us now. The latest aspect is an amended complaint containing three causes of action based on ERISA. That complaint alleges that defendants improperly administered the Plan by using more than $25,000 of its funds

for pleasure trips, by improvidently investing over $1 million in a Panama venture, by misappropriating some $50,000 for personal use, and by paying $201,820.58 to defendant Shapiro, the Plan's administrator. Plaintiffs sought an accounting, money damages payable to the Plan and an injunction against future misuse of its assets.

The district judge recognized that the complaint alleged "continuing wrongdoing," but concluded nonetheless that "all of the acts complained of appear to have taken place prior to January 1, 1975." Since ERISA did not become effective until that date, the district judge concluded that he lacked jurisdiction because ERISA was not retroactive. The judge rejected a complicated argument offered by plaintiffs that 29 U.S.C. §§1132(a)(3) and 1104(a)(1)(D) gave the court jurisdiction over any claim of violation of "the terms of the plan," regardless of when the violation took place. The judge also held, contrary to plaintiffs' contention, that 29 U.S.C. §1105(a)(3) did not confer jurisdiction over a claim against a trustee who, prior to ERISA's effective date, acquired knowledge continuing to the present time concerning another trustee's breach of duty. Accordingly, the judge dismissed the amended complaint, and this appeal followed.

II

Before us, plaintiffs in large part repeat the arguments they made below for construing ERISA to furnish federal jurisdiction to examine pre-1975 transactions. While the authority in this circuit is against plaintiffs on the retroactivity of ERISA, we have not directly addressed the other issues of statutory construction that plaintiffs raise. However, for reasons indicated below, we do not find it necessary to deal with them. In this court, plaintiffs stress that whatever else the trustees may have done before 1975, they also breached their trust after that date. Plaintiffs argue that when the trustees

became ERISA fiduciaries on January 1, 1975, they inherited an imprudent and unproductive investment in Panama, which they were bound to review and liquidate. As ERISA trustees, defendants cannot be excused from this obligation merely because the unwise investment was made before ERISA took effect.

The district judge did not deal with this argument, undoubtedly because it was not pressed with clarity below. However, the amended complaint contained allegations broad enough to encompass this claim of present fiduciary violation, and other papers before the district judge supported it. We have no doubt that under the "prudent man" rule, which is codified in ERISA, the trustees here had a duty within a reasonable time after ERISA took effect to dispose of any part of the trust estate which would be improper to keep.

Under these circumstances, we remand the case to the district court, which has jurisdiction under ERISA over plaintiffs' claim that the trustees improperly retained the Panama investment after January 1, 1975. Indeed, under the exclusive jurisdictional provisions of ERISA, that claim could be made nowhere else. See *Marshall v. Chase Manhattan Bank*, 558 F.2d 680 (2d Cir. 1977). We do not know whether the Fund actually possessed a Panama investment after January 1, 1975, or whether, if it did, keeping the investment was unwise. There was some dispute on the matter at oral argument in this court, and we cannot resolve such issues. But on this record, it was error for the district judge to rule as a matter of law, with no further inquiry into the facts, that jurisdiction was lacking under ERISA. We leave to the district court the question whether to take jurisdiction over the other claims against defendants. In exercising its discretion, the district court will undoubtedly keep in mind that a portion of plaintiffs' action must be brought in the federal court, that the district court and the parties have already devoted considerable time and

effort to the other incidents of alleged wrongdoing, that bifurcation of the claims may be wasteful and that success on the pendent claims may afford plaintiffs substantially complete relief. Of course, the substantiality of plaintiffs' claim concerning post-1975 fiduciary abuse will also be relevant to the court's determination.

Case remanded for further proceedings consistent with this opinion.

LUMBARD, *Circuit Judge* (concurring):

Sec. 401. INTERNAL REVENUE CODE

(a) REQUIREMENTS FOR QUALIFICATION.—A trust created or organized in the United States and forming part of a stock bonus, pension, or profit-sharing plan of an employer for the exclusive benefit of his employees or their beneficiaries shall constitute a qualified trust under this section—

* * * *

(2) if under the trust instrument it is impossible, at any time prior to the satisfaction of all liabilities with respect to employees and their beneficiaries under the trust, for any part of the corpus or income to be (within the taxable year or thereafter) used for, or diverted to, purposes other than for the exclusive benefit of his employees or their beneficiaries

* * * *

DEDUCTION FOR CONTRIBUTIONS OF AN EMPLOYER TO AN EMPLOYEES' TRUST OR ANNUITY PLAN AND COMPENSATION UNDER A DEFERRED-PAYMENT PLAN

Sec. 404 (a)(1)(A)(i) and (iii). (a) GENERAL RULE.—If contributions are paid by an employer to or under a stock bonus, pension, profit-sharing, or annuity plan, or if compensation is paid or accrued on account of any employee under a plan deferring the receipt of such compensation, such contributions or compensation shall not be deductible under this chapter; but, if they would otherwise be deductible, they shall be deductible under this section, subject, however, to the following limitations as to the amounts deductible in any year:

(1) PENSION TRUSTS.

(A) IN GENERAL.—In the taxable year when paid, if the contributions are paid into a pension trust, and if

such taxable year ends within or with a taxable year of the trust for which the trust is exempt under section 501(a), in an amount determined as follows:

(i) the amount necessary to satisfy the minimum funding standard provided by section 412(a) for plan years ending within or with such taxable year (or for any prior plan year),...

• • • •

(iii) an amount equal to the normal cost of the plan, as determined under regulations prescribed by the Secretary, plus, if past service or other supplementary pension or annuity credits are provided by the plan, an amount necessary to amortize the unfunded costs attributable to such credits in equal annual payments (until fully amortized) over 10 years, as determined under regulations prescribed by the Secretary.

29 USC §1082. Minimum funding standards

(a) Avoidance of accumulated funding deficiency. (1) Every employee pension benefit plan subject to this part shall satisfy the minimum funding standard (or the alternative minimum funding standard under section 305 [29 USC §1085]) for any plan year to which this part applies. A plan to which this part applies shall have satisfied the minimum funding standard for such plan year if as of the end of such plan year the plan does not have an accumulated funding deficiency.

(2) For the purposes of this part, the term "accumulated funding deficiency" means for any plan the excess of the total charges to the funding standard account for all plan years (beginning with the first plan year to which this part applies) over the total credits to such account for such years or, if less, the excess of the total charges to the alternative minimum funding standard account for such plan years over the total credits to such account for such years.

• • • •

29 USC §1082.

(b) Funding standard account. (1) Each plan to which this part applies shall establish and maintain a funding standard account. Such account shall be credited and charged solely as provided in this section.

(2) For a plan year, the funding standard account shall be charged with the sum of—

(A) the normal cost of the plan for the plan year,

(B) the amounts necessary to amortize in equal annual installments (until fully amortized)—

(i) in the case of a plan in existence on January 1, 1974, the unfunded past service liability under the plan on the

first day of the first plan year to which this part applies, over a period of 40 plan years,

• • • •

(3) For a plan year, the funding standard account shall be credited with the sum of —

(A) the amount considered contributed by the employer to or under the plan for the plan year,

• • • •

(5) Interest. (A) In general. The funding standard account (and items therein) shall be charged or credited (as determined under regulations prescribed by the Secretary of the Treasury) with interest at the appropriate rate consistent with the rate or rates of interest used under the plan to determine costs.

• • • •

29 USC §1082.

(c) Methods. (1) For purposes of this part, normal costs, accrued liability, past service liabilities, and experience gains and losses shall be determined under the funding method used to determine costs under the plan.

(2)(A) For purposes of this part, the value of the plan's assets shall be determined on the basis of any reasonable actuarial method of valuation which takes into account fair market value and which is permitted under regulations prescribed by the Secretary of the Treasury.

• • • •

29 USC §1102. Establishment of plan

(a) Named fiduciaries. (1) Every employee benefit plan shall be established and maintained pursuant to a written instrument. Such instrument shall provide for one or more named fiduciaries who jointly or severally shall have authority

to control and manage the operation and administration of the plan.

29 USC §1102.

(c) Optional features of plan.

Any employee benefit plan may provide—

(1) that any person or group of persons may serve in more than one fiduciary capacity with respect to the plan (including service both as trustee and administrator);

* * * *

29 USC §1103. Establishment of trust

(a) Benefit plan assets to be held in trust; authority of trustees.

* * * *

all assets of an employee benefit plan shall be held in trust by one or more trustees.

* * * *

29 USC §1103.

(c) Assets of plan not to inure to benefit of employer; allowable purposes of holding plan assets. (1) Except as provided in paragraph (2), (3), or (4) or subsection (d), or under section 4042 and 4044 [29 USC §§1342, 1344] (relating to termination of insured plans), the assets of a plan shall never inure to the benefit of any employer and shall be held for the exclusive purposes of providing benefits to participants in the plan and their beneficiaries and defraying reasonable expenses of administering the plan.

* * * *

29 USC §1104. Fiduciary duties

(a) Prudent man standard of care. (1) Subject to sections 403(c) and (d) [29 USC §1103(c) and (d)], 4042 [29

USC §1342], and 4044 [29 USC §1344], a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—

(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan;

(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;

(C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this title or title IV.

• • • •

29 USC §1106. Prohibited transactions

(a) Transactions between plan and party in interest. Except as provided in section 408 [29 USC §1108]:

(1) A fiduciary with respect to a plan shall not cause the plan to engage in a transaction, if he knows or should know that such transaction constitutes a direct or indirect—

(A) sale or exchange, or leasing, of any property between the plan and a party in interest;

(B) lending of money or other extension of credit between the plan and a party in interest;

(C) furnishing of goods, services, or facilities between the plan and a party in interest;

(D) transfer to, or use by or for the benefit of, a party in interest, of any assets of the plan; or

(E) acquisition, on behalf of the plan, of any employer security or employer real property in violation of section 407(a) [29 USC §1107(a)].

(2) No fiduciary who has authority or discretion to control or manage the assets of a plan shall permit the plan to hold any employer security or employer real property if he knows or should know that holding such security or real property violates section 407(a) [29 USC §1107(a)].

(b) Transactions between plan and fiduciary. A fiduciary with respect to a plan shall not—

(1) deal with the assets of the plan in his own interest or for his own account,

(2) in his individual or in any other capacity act in any transaction involving the plan on behalf of a party (or represent a party) whose interests are adverse to the interests of the plan or the interests of its participants or beneficiaries, or

(3) receive any consideration for his own personal account from any party dealing with such plan in connection with a transaction involving the assets of the plan.

• • • •

29 USC §1113. Limitation of actions

No action may be commenced under this title with respect to a fiduciary's breach of any responsibility, duty, or obligation under this part, or with respect to a violation of this part, after the earlier of—

(1) six years after (A) the date of the last action which constituted a part of the breach or violation, or (B) in the case

of an omission, the latest date on which the fiduciary could have cured the breach or violation, or

(2) three years after the earliest date on which the plaintiff had actual knowledge of the breach or violation; except that in the case of fraud or concealment, such action may be commenced not later than six years after the date of discovery of such breach or violation.

29 USC §1132. Civil enforcement

(a) Persons empowered to bring a civil action. A civil action may be brought—

(1) by a participant or beneficiary—

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

* * * *

29 USC §1132

(g) Attorney's fees and costs; awards in actions involving delinquent contributions. (1) In any action under this title (other than an action described in paragraph 2) by a participant, beneficiary, or fiduciary, the court in its discretion may allow a reasonable attorney's fee and costs of action to either party.

* * * *

TREAS. REG. §1.401-1(b)(3)

* * * *

The plan must benefit the employees in general although it need not provide benefits for all of the employees.

* * * *

Similarly, a stock bonus or profit-sharing plan is not a plan for the exclusive benefit of employees in general if the funds

therein may be used to relieve the employer from contributing to a pension plan operating concurrently and covering the same employees.

* * * *

Rev. Rul. 69-295—qualified profit-sharing plan may permit employees to transfer vested amounts to pension plan—PS No. 37 superseded.—The purpose of this Revenue Ruling is to update and restate, under the current statute and regulations, the position set forth in PS No. 37, dated October 7, 1944, relating to the use of funds held by a profit-sharing trust to meet the costs of a qualified pension plan.

* * * *

Section 1.401-1(b)(3) of the Income Tax Regulations provides that a plan must benefit the employees in general. A profit-sharing or stock bonus plan is not for the exclusive benefit of employees in general if the funds therein may be used to relieve the employer from contributing to a pension plan operating concurrently and covering the same employees. All of the surrounding and attendant circumstances and the details of the plan will be indicative of whether it is a bona fide plan for the exclusive benefit of employees in general.

A profit-sharing or stock bonus plan that permits the funds therein to be used to meet the costs of a pension or annuity plan operated concurrently and covering the same employees, if and when the employer suspends contributions to the latter plan, is generally called a "feeder" plan. As provided in section 1.401-1(b)(3) of the regulations, such a plan is not for the exclusive benefit of the employees or their beneficiaries because it relieves the employer from contributing to the pension or annuity plan.

* * * *

ONE DOLLAR AT 7.4% INTEREST COMPOUNDED ANNUALLY

END OF YEAR	
1971	1.0740
1972	1.1535
1973	1.2388
1974	1.3305
1975	1.4290
1976	1.5347
1977	1.6483
1978	1.7702
1979	1.9012
1980	2.0419
1981	2.1930
1982	2.3553
1983	2.5296
1984	2.7168
1985	2.9179
1986	3.1338
1987	3.3657
1988	3.6147
1989	3.8822
1990	4.1695
1991	4.4781
1992	4.8094
1993	5.1653

TABLE I

(A Trial Exhibit)

SCHEDULE OF EARNINGS

1ST NATIONAL - MERIDIAN PENSION PLAN

SOURCE	YEAR	EARNINGS RATE	Value of $1 AT CUMULATIVE RATE
M0896	1971-72-73 (Exh. 4)	52.73	1.5273
	1974	no data	
M0903	1975 (loss)	-2.56%	1.4882
M0910	1976	19.40%	1.7769
M0926	1977	6.40%	1.8906
M0926	1978 (loss)	-4.07%	1.8137
M0938	1979	48.60%	2.6951
M0950	1980	37.05%	3.6937
M0960	1981 (loss)	-21.44%	2.9018
M0816	1982 (loss)	-6.55%	2.7117
M0862	1983	4.07%	2.8221
M1073	1984	10.94%	3.1308
M1073	1985	27.61%	3.9952
M1048-9	1986	14.79%	4.5861
M1031-2	1987	4.63%	4.7984
M1004	1988	16.89%	5.6088
M1004	1989	34.86%	7.5641
M0988	1990 (loss)	-0.01%	7.5632
M0973	1991	36.54%	10.3268
M1221	1992	9.47%	11.3047

TABLE II

(A Trial Exhibit)

CONTRIBUTIONS AND BENEFITS

SOURCE		YEAR	CONTRIBUTIONS	BENEFITS
B-B-Act'l (M03340)	**	1974	$195,727	$77,783
M 0903	*	1975	221,229	87,020
M 0910	*	1976	316,494	100,399
M 0916	**	1977	268,700	108,099
M 0926	*	1978	358,600	110,183
M 0938	*	1979	483,000	188,826
M 0950	*	1980	505,789	172,244
M 0960	*	1981	135,621	214,007
M 0790	*	1982	123,363	211,712
M 0794				
M 0839	*	1983	0	245,727
M 1092	*	1984	(None from 1st Nat.) 1,109,950 (Am. Bank)	(None to 1st Nat. people) 1,267,012 M-1073
M 1049	*	1985	3,569,263	2,254,752
M 1049	*	1986	5,040,000 2,528,110 on M 1032	3,569,263
M 1032	*	1987	5,001,550	2,806,087
M 1017	**	1988	975,246	2,833,342
M 1004	*	1989	0	969,314
M 0244				
M 0989		1990	0	2,372,591
M 0259	**			
M 0973	*	1991	0	2,804,518

M 0298				
M 1192	**	1992	0	4,756,910
M 1242	*	1993	0	3,841,337

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* = Attached to Table II, Exhibit B

** = Attached hereto

TABLE III

(A Trial Exhibit)

No. 95-889

Supreme Court, U.S.
FILED
JAN 4 1995
CLERK

In The

Supreme Court of the United States

October Term, 1995

RUTH J. KUHNS on behalf of herself and all others similarly situated,

Petitioner,

vs.

MERIDIAN BANCORP, INC., successor to THE FIRST NATIONAL BANK OF ALLENTOWN,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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I. QUESTION PRESENTED

Whether this Court should issue a writ of certiorari to review the Third Circuit's unpublished decision that Petitioner's claims are barred by laches and the applicable statute of limitations where Petitioner waited more than twenty-one years after the transaction at issue to file suit and where the Third Circuit's decision created no conflict among the Circuit courts requiring this Court's review.

II. PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE

The Petitioner is Ruth J. Kuhns, a plaintiff class representative in the proceedings before the District Court and an appellant/cross-appellee in the proceedings before the Court of Appeals. Respondent is Meridian Bancorp, Inc., the defendant in the proceedings before the District Court and the appellee/cross-appellant in the proceedings before the Court of Appeals. Respondent has no parent companies or non-wholly owned subsidiaries requiring disclosure under Rule 29.6.

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V. JURISDICTIONAL STATEMENT

This Court has jurisdiction pursuant to 28 U.S.C. §1254(1) because this proceeding involves a judgment by the Court of Appeals for the Third Circuit in favor of Respondent.

VI. COUNTERSTATEMENT OF THE CASE

A. Background And Procedural History.

Petitioner challenges a 1970 business decision by Respondent's predecessor to modify its employee benefit program by replacing its profit sharing plan with a defined benefit plan. The Third Circuit held that the statute of limitations and laches bar Petitioner's claims because she waited over twenty-one years after the transaction at issue to file suit.

When the First National Bank of Allentown replaced its profit sharing plan with the defined benefit plan in 1970 enhancing its employees' retirement benefits, all the bank's employees were notified of the changes and all employees, following a prolonged period of silence, appeared satisfied with the changes. But more than twenty-one years after first knowing of the changes, three of the employees, the Plaintiffs in proceedings below, commenced this action in July 1992 to challenge the 1970 transaction, claiming they are entitled to both a defined benefit and the profit sharing benefit it replaced.

The defined benefit plan was established in 1971 to replace (not supplement) the profit sharing plan, which had provided inadequate benefits for the bank's employees. According to its clear language, the defined benefit plan provided a retirement benefit equal to the "greater of" (a) a defined benefit based on the employee's total years of service (including service

before the profit sharing plan existed) and the employee's final average pay before retirement; or (b) a lifetime annuity based on the value of the employee's account balances in the previously existing profit sharing plan plus 4% interest (later increased to 5%).

Despite the defined benefit plan's clear provisions, and the termination of the profit sharing plan, the Plaintiffs claim they are entitled to both the enhanced defined benefit and the profit sharing benefit it replaced. [Petition at 12]. In their complaint, brought as a class action, the Plaintiffs below (hereinafter, the "Employees") purported to raise claims based on the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§1001-1461 ("ERISA") and on Pennsylvania common law.

1. The profit sharing and pension plans.

The Employees claim their individual profit sharing accounts were "embezzled" by the Bank[1] in 1970 when the assets of the now-replaced profit sharing plan were transferred to the newly established defined benefit retirement plan. With good reason, the Third Circuit flatly rejected this allegation finding it "patently

---

[1] First National Bank of Allentown merged into Meridian Bancorp, Inc. in 1985. For ease of reference, both Meridian, the defendant below, and First National Bank of Allentown are referred to as the Bank.

false" and "symptomatic of the failings of [the Employees'] lawsuit." [Opinion at 4].

In 1954, the Bank established The First National Bank of Allentown Employees' Profit Sharing Trust (the "Profit Sharing Plan"). The Profit Sharing Plan provided retirement benefits through separate "accounts" for each participant that consisted solely of contributions from the Bank and investment returns on these contributions. Employee contributions were neither permitted nor made.

When the Bank evaluated the Profit Sharing Plan in 1970, serious deficiencies emerged, including the failure to provide lifetime benefits or adequate monthly benefits in many cases. The Bank retained an independent pension consulting firm and assigned two employees, David Hoffman and William Shellhammer (one of the Plaintiffs below), to address the problems with the Profit Sharing Plan.

Shellhammer and Hoffman recommended that the Bank replace the Profit Sharing Plan with a defined benefit plan with past service credit. This plan was adopted effective January 1, 1971 (the "Pension Plan"). Because the Pension Plan increased benefits over the Profit Sharing Plan, the actuarial funding cost for the past service benefits alone exceeded $3.5 million, which was more than the Bank's annual net income, and roughly $1.3 million more than the value of the Profit Sharing Plan assets.

2. Amendment and termination of Profit Sharing Plan

To support their claim for both a Profit Sharing and a Pension benefit, the Employees claim the Profit Sharing Plan was not terminated. [Petition at 18-19]. The Third Circuit rejected this claim because the Employees failed to make a "colorable showing" that proper procedures were not followed. [Opinion at 4 n.3]. In fact, there is no evidence to demonstrate that the Profit Sharing Plan was not terminated.

Pursuant to the plan's provisions, the Bank amended and terminated the Profit Sharing Plan on December 31, 1970 and January 2, 1971 "to convert the existing profit sharing plan into a pension plan." The Bank retained independent pension consultants, attorneys, accountants and tax consultants for advice on completing the transaction. IRS approval was sought and obtained by an application for an IRS determination letter for the Pension Plan, which included a copy of the Pension Plan and disclosed the use of the Profit Sharing Plan assets to fund the Pension Plan and the 4% interest rate. The IRS issued a favorable determination letter, verifying that the Pension Plan satisfied the Internal Revenue Code's requirements for a qualified plan, including the "exclusive benefit" provision of Code §401(a). 26 U.S.C. §401(a).

3. The Employees' accrued benefits were preserved.

The Pension Plan preserved all of the employees' pre-1971 accrued benefits. It did this with its benefit formula that provided benefits equal to the "greater of" (a) a monthly benefit based on "final average pay"; or (b) a monthly benefit based on the participant's "Profit Sharing Account." Under this calculation, the participant's "Profit Sharing Account" (a credit equal to the value of their pre-1971 accrued benefits plus 4% interest to retirement) was converted to a monthly benefit, payable for life, using a standard annuity conversion table. This benefit was then compared to the "final average pay" benefit, and participants were paid the "greater of" the two.

The Pension Plan also paid death benefits equal to the remaining balance of participants' "Profit Sharing Accounts" (pre-1971 accrued benefits plus interest) on behalf of participants who died before receiving retirement benefits equal to their "Profit Sharing Account" balance. Finally, the Pension Plan's termination provisions preserved pre-1971 accrued benefits by requiring an immediate payment equal to the value of the "Profit Sharing Account" balance (before any other distributions) in the event of a plan termination. In short, no participant received less than the value of their pre-1971 accrued benefits.

4. The Employees' knowledge of the transaction in 1970 and 1971.

Every Bank employee was informed fully in 1971 about the transaction involving the Pension Plan and its use of the Profit Sharing Plan's assets. It was announced in an employee news bulletin and explained by Shellhammer and others at employee meetings. It was described in the Bank's 1971 Annual Report and at the annual shareholders' meeting, where Shellhammer was designated to answer questions. A benefit booklet distributed to all employees explained how the Profit Sharing Plan's assets would be used as partial funding for the benefits under the new plan. The employees were also told they would receive only one retirement benefit, not two.

As the Court of Appeals held, each of the Employees had "actual knowledge" of the transaction and their "claims" more than three years before filing suit. 29 U.S.C. 1113(2) (three year statute of limitations for plaintiffs with "actual knowledge" of alleged violation). For example, the Petitioner hired a lawyer, who as early as 1986 raised the very issues on which the lawsuit is based, but waited until 1992 to file suit.

In the more than twenty years from the transaction to the filing of suit, the Bank's pension consultant discarded its records. Plan-related documents, such as notices to employees, the 1971 actuarial report, the consultant's proposal and other documents relevant to the defense, were lost. Most important, two of the three

Profit Sharing Plan trustees died before appellants filed suit, and when the third trustee was deposed, he did not remember being a trustee of the Profit Sharing Plan, much less the specifics of the transaction.

B. Proceedings Before The District Court.

The District Court granted the Bank's motion for summary judgment and dismissed the Employees' state law claims as barred by laches and the ERISA §404 claims as barred by ERISA's statute of limitations. However, the District Court held the Employees' ERISA §403(c) claim regarding the use of the Profit Sharing Plan's assets and an improper interest credit allowing plan assets to inure to the Bank's benefit alleged a "continuing violation" not wholly barred by ERISA's statute of limitations.

Relying on Hickerson v. Velsicol Chemical Corporation, 778 F.2d 365 (7th Cir. 1985), cert. denied, 479 U.S. 815 (1986), the District Court determined the Bank's use of the Profit Sharing Plan assets for the Pension Plan was lawful if the Pension Plan's 4% interest rate was a "reasonable" rate. Following a bench trial to determine the reasonableness of the 4% interest rate, the District Court concluded that 7.4% was a reasonable rate and recalculated the Employees' benefits using the 7.4% rate.

C. The Court Of Appeals' Decision.

On September 8, 1995, the Third Circuit affirmed the District Court on the issues raised in the Employees' appeal but reversed the District Court on the issues raised in the Bank's appeal. First, the Court of Appeals rejected the Employees' claims that the Profit Sharing Plan was not terminated and that the Bank "embezzled" plan assets. [Opinion at 4 and n.3].

The Third Circuit then reversed the District Court's "continuing violation" decision finding the "continuing violation" exception inapplicable to the facts of this case. [Opinion at 6-7]. Because none of the Employees' time-barred claims were preserved by the continuing violation exception, the Third Circuit remanded with directions to the District Court to enter judgment for the Bank on all counts.

Because of the Court's resolution of the statute of limitations issues, its decision did not rest on the Bank's other arguments for dismissal, namely the District Court's failure to apply ERISA's non-retroactivity provisions and failure to apply laches to the Employees' ERISA claims. The Third Circuit, however, concluded that these arguments "appear to have merit and would be alternate grounds for reversal on the cross-appeal." [Opinion at 10 n.6].

VII. REASONS FOR DENYING THE WRIT

There is nothing unique or surprising about the Third Circuit's decision that the Employees' claims are barred by the statute of limitations and laches. This result was compelled by the Employees' failure -- despite their "actual knowledge" -- to file suit until the 1970 transaction was more than two decades old. Nor is there any conflict among the Circuits; instead, the Third Circuit merely applied well-settled legal principles to the unique facts of this case. Far from violating federal law, the Third Circuit's decision is fully consistent with ERISA's statute of limitations and the policies it reflects.

Finally, there is no compelling reason for review because the transaction at issue (conversion of a profit sharing plan to a defined benefit plan) is governed by well-settled legal principles properly applied by the Third Circuit in this case, and is, in any event, an uncommon transaction. Review by this Court is therefore unwarranted as it is unlikely that future controversies over the type of transaction at issue will arise.

A. There Is No Conflict Among The Circuits.

Petitioner's claim of a conflict among the Circuits over the "continuing violation" exception is hollow and should be rejected because (1) the Third Circuit did not reject the continuing violation theory as Petitioner suggests [Petition at 14]; (2) there is no conflict between the Third and Ninth Circuits; and (3) Petitioner's "actual

knowledge" precludes her reliance on the "continuing violation" exception.

1. The Court of Appeals correctly found the "continuing violation" exception inapplicable to this case.

ERISA's express statute of limitations for fiduciary claims is designed to provide repose from the type of stale claims asserted in this case. Larson v. Northrop Corp., 21 F.3d 1164, 1171-72 (D.C. Cir. 1994) (analyzing policies of ERISA §413). When, as in this case, the alleged ERISA violation is a plan amendment or transaction, the statute of limitations runs from the date of the amendment or transaction. E.g., Larson, 21 F. 3d at 1171-72; International Union v. Murata Erie North America, Inc., 980 F.2d 889, 899 (3d Cir. 1992); Ziegler v. Connecticut General Life Ins. Co., 916 F.2d 548 (9th Cir. 1990).

ERISA's statute of limitations on the Employees' claims began to run in 1975 when ERISA became effective and expired long before they filed their complaint. This is why the Employees invoke the "continuing violation" exception to revive their stale claims.

Recognizing that ERISA imposes an ongoing duty on plan fiduciaries to act in certain situations to prevent violations of ERISA, some courts have applied the "continuing violation" exception in cases where a

fiduciary's failure to act constitutes a separate violation of ERISA. For example, in Morrissey v. Curran, 567 F.2d 546 (2d Cir. 1977), a plan fiduciary's persistent failure to sell improper plan investments was a "continuing violation" of the duty to monitor the plan's investments. 29 U.S.C. §1104(a)(1)(C). The fiduciary could therefore be sued for failing to sell the improper investment even though claims relating to the underlying transaction were time-barred.

The "continuing violation" exception, however, does not apply to every alleged breach of fiduciary duty. Instead, the exception requires a series of overt acts, each constituting a separate breach. Phillips v. Alaska Hotel & Restaurant Emp. Pension Fund, 944 F.2d 509, 523 (9th Cir. 1991) (O'Scannlain, J., concurring), cert. denied, 112 S. Ct. 1942 (1992). Moreover, (and critical here) the exception does not apply to a plan amendment or change in formal policy where the injury results merely from implementation of the amendment or policy. In such cases, the cause of action accrues only once -- when the plan amendment or formal policy is adopted.

The distinction between continuing violations and implementation of plan amendments was examined in Russell v. Board of Trustees, 968 F.2d 489 (5th Cir. 1992), cert. denied, 113 S. Ct. 1266 (1993), where the court found the application of a plan amendment on eligibility rules was not a continuing violation. Similarly, in Phillips, the administration of allegedly improper vesting rules was not a continuing violation. 944 F.2d at 523 (O'Scannlain, J., concurring). This

distinction was also recognized in Martin v. Consultants & Administrators, Inc., 966 F.2d 1078, 1087-88 (7th Cir. 1992), where the court held the continuing violation exception applicable to repetition of informal administrative practices, but inapplicable to the implementation of formal policies.

The Third Circuit properly applied ERISA's statute of limitations, and rejected the "continuing violation" exception, based on the facts of the case. There was no continuing violation or series of overt acts constituting separate fiduciary breaches. Cf. Phillips, 944 F.2d at 523. There was instead the consistent application of a properly enacted plan amendment. The Third Circuit therefore properly rejected Petitioner's invocation of the "continuing violation' exception, and its conclusion is consistent, not in conflict, with the approach taken by other Circuits. Russell, 968 F.2d 489; Martin, 966 F.2d 1078, 1087-88. Petitioner's disagreement with the Third Circuit's application of settled legal principles to the facts of the case does not warrant review by this Court.

2. There is no conflict between the Ninth and Third Circuits over the Meagher decision.

As the Third Circuit concluded, the Ninth Circuit's decision in Meagher v. International Association of Machinists & Aerospace Workers Pension Plan, 856 F.2d 1418 (9th Cir. 1988), cert. denied, 490 U.S. 1039 (1989), is fundamentally distinguishable from

this case. In Meagher, the plan's "living pension" provision required pension increases each time the employer raised salaries for current employees holding the job classifications the retirees held while employed. 856 F.2d at 1419. The employer tried to avoid this obligation by relying on a plan amendment revoking the "living pension" provision even though that amendment had been declared unlawful in prior litigation.

The employees in Meagher sued, claiming the amendment violated ERISA §204(g), 29 U.S.C. §1054(g), which prohibits plan amendments that reduce accrued benefits. The court concluded that each time the employer applied the previously invalidated amendment, it breached ERISA §204(g) again by reducing the employees' accrued benefits in violation of the plan's provisions. 856 F.2d at 1423.

As the Third Circuit held, the Meagher decision is distinguishable from this case because of the nature of the alleged violation. Indeed, it has been distinguished twice in similar circumstances within the Ninth Circuit.

First, the Ninth Circuit explained in Ziegler, 916 F.2d 548, that Meagher is limited to claims under ERISA §204(g), a statute "specifically requiring an actual injury to the plaintiff, a reduction of accrued benefits." 916 F.2d at 551. As recognized by the Ninth Circuit in Ziegler (and the Third Circuit here), the cause of action under ERISA 204(g) accrues only when the harm (a decrease of accrued benefits) is inflicted. Each time the employer in Meagher inflicted such harm, and violated

the plan's terms by relying on the invalid amendment, a new cause of action under §204(g) accrued.

Unlike the plaintiff in Meagher, the Employees never asserted a §204(g) claim either in their complaint or during the proceedings before the District Court. Nor could they because there is no post-ERISA plan amendment at issue in this case, and ERISA §204(g) does not apply to pre-ERISA amendments. 29 U.S.C. §1061. Instead, the Employees alleged claims under ERISA §§403 and 404, 29 U.S.C. §§1103 and 1104, based on the 1970 plan conversion. These claims accrued at the date of the transaction. See e.g., Larson, 21 F.3d at 1171-72; Murata, 980 F.2d at 988-900. Unlike Meagher, there was no series of repeated violations of the plan's provisions.

Second, Judge O'Scannlain distinguished Meagher in his concurring opinion in Phillips. Unlike the employer's successive and overt violations of ERISA §204(g) in Meagher, the continuing violation exception did not apply to the Phillips plaintiffs' claims that the employer's implementation and operation of restrictive vesting rules violated ERISA. 944 F.2d at 523. Thus, Judge O'Scannlain concluded, like the courts in Russell and Martin, that the continuing violation exception does not apply to the application of a plan amendment or formal policy.

This case simply involves the consistent administration of the Pension Plan in accordance with its provisions. There is no series of separate and overt

violations of the plan's provisions as in Meagher. The Third Circuit therefore created no conflict among the Circuits by properly distinguishing Meagher, and the writ should be denied.

3. Petitioner's "actual knowledge" precludes application of the "continuing violation" exception.

The federal courts agree that the "continuing violation" exception cannot be invoked by a claimant who had "actual knowledge" of an alleged violation. Phillips, 944 F.2d at 520-23; Starr v. JCI Data Processing, Inc., 757 F. Supp. 390, 395 (D. N.J. 1991). This is because ERISA §413, 29 U.S.C. §1113, "requires application of the earlier of either six years from the breach or three years from actual knowledge of the breach" as a statute of limitations. 757 F. Supp. at 345 (emphasis in original). Indeed, the Ninth Circuit would not extend its holding in Meagher to this case because the Employees each had actual knowledge of the alleged violation more than three years before filing suit. Phillips, 944 F.2d at 521. For this reason as well, the writ should be denied.

B. There Is No Violation of Federal Law Requiring Review By This Court.

Petitioner incorrectly claims the Third Circuit's decision violates federal law by undermining ERISA's "anti-inurement" provision, interfering with the Employees' rights to "vested" benefits and preventing the

Employees from pursuing their claims under "tax law." Contrary to Petitioner's claims, the Third Circuit's statute of limitations ruling comports fully with federal law.

The applicable federal law is found in ERISA §413, 29 U.S.C. §1113, which sets forth ERISA's statute of limitations for breaches of fiduciary duty. This statute reflects "a judgment by Congress that when six years has passed after a breach or violation, and no fraud or concealment occurs, the value of repose will trump other interests, such as a plaintiff's right to seek a remedy." Larson, 21 F.3d at 1172 (analyzing ERISA's statute of limitations). Accordingly, federal law is well served by the Third Circuit's decision that the statute of limitations bars the Employees' twenty-one year old claims.

Petitioner's attempt to circumvent ERISA's statute of limitations by resorting to federal common law fails for two reasons. First, federal common law is inapplicable because ERISA already provides remedies for the wrongs the Employees allege. E.g., Tassinare v. American Nat'l. Ins. Co., 32 F.3d 220 (6th Cir. 1994); Hozier v. Midwest Fasteners, Inc., 908 F.2d 1155, 1162 n. 8 (3d Cir. 1990). Because ERISA expressly provides remedies for the alleged "taking" of plan assets under its anti-inurement, exclusive benefit and fiduciary violation provisions, 29 U.S.C. §§1103(c), 1104(a)(1) and 1109, creation of a federal common law cause of action would improperly expand the "exclusive" remedies Congress provided in ERISA. Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 54 (1987); Hozier, 908 F.2d at 1162 n.8.

Second, the authority to develop federal common law for ERISA "is not the authority to revise the text of the statute," Mertens v. Hewitt Associates, 113 S. Ct. 2063, 2070 (1993), or contradict its language and policies. Singer v. Black & Decker Corp., 964 F.2d 1449, 1453 (4th Cir. 1992). Yet the federal common law remedy the Employees propose (a cause of action not subject to ERISA's statute of limitations) contradicts ERISA §413 and its underlying policies. Allowing fiduciary claims to be recast as federal common law claims to avoid the statute of limitations would frustrate the policy of repose reflected in ERISA §413. Larson, 21 F.3d at 1172. In short, federal common law cannot be used because the Employees' "lack of a remedy does not result from some awkward gap in the statutory scheme, but instead results from [the Employees'] delay in seeking relief." Tassinare, 32 F.3d at 225.

Moreover, none of Petitioner's proposed federal remedies provides any basis to avoid application of ERISA's statute of limitations. For example, the Employees cannot avoid the statute by alleging an anti-inurement claim under ERISA §403(c), 29 U.S.C. §1103(c), because the statute expressly applies to actions commenced under ERISA's fiduciary provisions, including §403(c). 29 U.S.C. §1113 ("No action may be commenced under this title with respect to a fiduciary's breach of any responsibility, duty or obligation under this part . . . ."). ERISA's statute of limitations has therefore been applied to similar claims involving alleged inurement of plan assets to an employer's benefit. Cf. Gluck v. Unisys Corp., 960 F.2d 1168, 1179 (3d Cir.

1992) ("if the 1984 amendment did wrongfully channel funds from the plan to the company, then, absent fraud or concealment, the six year limitations period would have begun to run at the time the 1984 amendment was adopted.").

Similarly, Petitioner's claims for "vested" benefits do not negate the statute of limitations. Indeed, even in routine denial of benefit claims, courts have long applied ERISA's statute of limitations (or "borrowed" a state law statute of limitations for non-fiduciary claims) even though such claims often involve allegedly vested benefits. E.g., Gluck, 960 F.2d at 1179.

Finally, Petitioner's alleged "tax law" claims provide no basis for ignoring ERISA's statute of limitations. Here Petitioner pursues "claims" under the "exclusive benefit" provision in 26 U.S.C. §401(a), an interpretive regulation and a revenue ruling. [Petition at 22]. The Employees, however, have no private cause of action under the Code's "exclusive benefit" provision. Reklau v. Merchants National Corp., 808 F.2d 628, 631 (7th Cir. 1986), cert. denied, 481 U.S. 1049 (1987) (IRC §401 creates no substantive rights that can be enforced by plan participants); Cf. Trenton v. Scott Paper Co., 832 F.2d 806, 810 (3d Cir. 1987), cert. denied, 485 U.S. 1022 (1985) (no private cause of action under IRC §416(g)).

Nor are there any grounds for using the "tax law" to frustrate Congress' intent of barring untimely fiduciary claims. The framework of civil enforcement under

ERISA would be frustrated if, for example, plan participants could avoid the express statute of limitations on ERISA's "exclusive benefit" provision, 29 U.S.C. §1104(a), by filing a private cause of action under the Internal Revenue Code's "exclusive benefit" provision, 26 U.S.C. §401(a).

Whether styled as a continuing violation or federal common law argument, the underlying problem with the Employees' position is the same: their position conflicts directly with ERISA's express statute of limitations and the policies it reflects. The Employees' position would effectively repeal the statute of limitations in many pension cases, particularly cases involving defined benefit plans, where creative participants can allege improper "inurement" from every plan amendment or decision that affects benefits and, theoretically, reduces an employer's funding costs. Cf. Malia v. General Elec. Co., 23 F.3d 828, 830-31 n. 2 (3d Cir.), cert. denied, 115 S. Ct. 377 (1994) (examining funding principles in defined benefit plans). This would lead to absurd and unintended results, with plan participants (like the Employees) waiting decades to challenge plan transactions.

The Third Circuit properly rejected the Employees' ill-conceived statute of limitations arguments and its decision does not require review by this Court.

C. The Facts Of This Case Present No Compelling Reason For Issuance Of The Writ.

There are two reasons why this case does not involve the type of important substantive issues requiring review by this Court.

First, the Employees' basic contentions are readily refuted by well-settled legal principles and the factual record developed before the District Court. The Employees' claim that the Profit Sharing Plan could not be converted into the Pension Plan because of their vested interests in their profit sharing accounts fails because the Employees had vested rights to accrued benefits, not an ownership interest in the underlying trust. Hickerson, 778 F.2d at 372-74.

So long as the Employees' accrued benefits were not reduced -- which they were not under the Pension Plan's "greater of" benefit formula -- the transaction satisfied both common law and ERISA. Malia, 23 F.3d at 831 (analyzing ERISA §208's protections for accrued benefits in plan mergers and combinations); Genevese v. Martin Marietta Corp., 312 F. Supp. 1186, 1189 (E.D. Pa. 1969) (employer could use employee contributions to fund new plan under common law exclusive benefit rule); Garner v. Girard Trust Bank, 442 Pa. 166, 170-71, 275 A.2d 359, 361-62 (1971) (plan could require forfeiture of vested benefits as penalty for employee competing with employer). Nor was the Bank's business decision to convert to a new employee benefit program

constrained by fiduciary duties under common law or ERISA. Blaw Knox Retirement Plan v. White Consol. Indus., 998 F.2d 1185, 1189-90 (3d Cir. 1993) (ERISA's business judgment rule); Sutter v. BASF Corp., 964 F.2d 556, 562 (6th Cir. 1992) (addressing pre-ERISA plan mergers).

Second, the type of transaction at issue (conversion of a profit sharing plan to a defined benefit plan) is uncommon and unlikely to reoccur with any frequency. Indeed, since ERISA was enacted, there have been only two cases involving this type of transaction (Hickerson and the present case). Moreover, because of the costs involved in administering defined benefit plans, including costs for actuarial services and PBGC insurance, the trend in recent years has been for employers to move away from defined benefit plans to defined contribution plans. Thus, a decision by the Court on the merits of this case is unlikely to have any significant impact on parties other than those involved in this case.

Finally, the Employees' claim that they are entitled to both a profit sharing and a pension benefit because the Profit Sharing Plan was not terminated is not supported by the record. As the Court of Appeals noted, the Employees failed to make a "colorable showing" that the Profit Sharing Plan was not terminated. [Opinion at 4 n. 3].

This case presents no unsettled or controversial legal issues and the resolution of the Employees' claims

will have little, if any, impact on the public at large. There therefore is no compelling reason for the Court to review this case and the writ should be denied.

VIII. CONCLUSION

This case involves no conflict among the Circuits, no violation of federal law, and reaches no important federal issues requiring review by this Court. Instead, this case involves the Third Circuit's reasoned application of well settled legal principles and dismissal of claims that were over two decades old when filed. Petitioner's disagreement with the Third Circuit's application of settled legal principles to the facts of this case does not merit review by this Court. For these reasons, Respondent respectfully requests the Court to deny the petition for writ of certiorari.

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